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VERMONT SUPREME COURT

166
June 17

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT

BY

WENDELL P. STAFFORD

VOLUME 71

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JUDGES

OF THE

SUPREME COURT OF VERMONT

DURING THE TIME OF THESE REPORTS

HON. JONATHAN ROSS, CHIEF JUDGE
until his resignation January 12, 1899

HON. RUSSELL S. TAFT
Appointed Chief Judge upon resignation of Chief Judge Ross

HON. JOHN W. ROWELL

HON. JAMES M. TYLER

HON. LOVELAND MUNSON

HON. HENRY R. START

HON. LAFORREST H. THOMPSON

HON. JOHN H. WATSON
Appointed January 19, 1899

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ARGUED AND DETERMINED

IN THE

SUPREME COURT OF VERMONT.

JAMES M. BOUTWELL, et al., *vs.* WILLIAM MARR, et al.

October Term, 1896.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and MUNSON, JJ.

Opinion filed February 15, 1899.

Conspiracy.—The crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means.

Conspiracy.—The law punishes as a crime the mere agreement to effect an illegal purpose or to use illegal means; but a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement.

Intimidation.—One has a right to withdraw his own patronage when he pleases, but he has no right to employ threats or intimidation to divert the patronage of another.

Boycotting.—If it be granted as a general proposition that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be brought about by such methods as to make its united action an unlawful means.

Boycotting.—The jury having found, as the evidence tended to show, that the plaintiffs were injured in their business by the withdrawal of

patronage through the action of the defendants' organization, which was held to unity of action by a system of fines and penalties against disobedient members, the plaintiffs are entitled to redress.

Unlawful Means.—The result is not affected by the fact, if it be a fact, that the members voluntarily joined the association and accepted the by-laws providing for the imposition of coercive fines, for the law sees in the membership of an association of this character both the authors and the victims of the coercive system.

Unlawful Means.—Moreover, it can hardly be supposed that the defendants' organization reached its present proportions without some previous use of the unlawful means referred to.

Exemplary Damages.—The exemplary damages found by the jury cannot be allowed, for, if ever recoverable against several defendants, they are only recoverable where all are shown to have been moved by a wanton desire to injure.

Evidence.—The holding of the court upon matters of evidence is stated in the opinion too concisely to admit of further condensation in the head-note.

CASE. Trial by jury at the September term, 1895, Washington county, *Start*, J., presiding. Verdict and judgment for the plaintiffs. The defendants excepted.

At the close of the testimony the defendants moved for a verdict for insufficiency of evidence. The motion was overruled.

The jury were permitted to include exemplary damages in their verdict, but were required to report the amount thereof separately.

George W. Wing, *C. A. Prouty* and *J. P. Lamson* for the defendants, cited, *State* v. *Johnson*, 40 Kan. 266; *People* v. *Parker*, 67 Mich. 222; *Spies* v. *People*, 122 Ill. 1; *Ford* v. *State*, 112 Ind. 373; *State* v. *Weaver*, 57 Ia. 730; *Benford* v. *Sanner*, 40 Pa. St. 9; *State* v. *Duncan*, 64 Mo. 262; *State* v. *Pike*, 51 N. H. 105; *State* v. *Ross*, 29 Mo. 32; *Reid* v. *State*, 20 Ga. 681; *Hunter* v. *Commonwealth*, 56 Am. Dec. 121; *State* v. *Arnold*, 48 Ia. 566; *People* v. *Irwin*, 77 Cal. 494; *Clemitt* v. *Watson*, 42 N. E. 367; *Manufacturing Co.* v. *Hollis*, 54 Minn. 223; *Cote* v. *Murphy*, 159 Pa. St. 420; *Commonwealth* v. *Hunt*, 4 Met. 111; *Heywood* v. *Tillson*, 75 Me. 225; *Manufacturing Co.* v. *Lumbermen's Association*,

21 L. A. R. 337; *Carew* v. *Rutherford*, 106 Mass. 1; *Jenkins* v. *Fowler*, 24 Pa. St. 308; *Longshore, etc., Co.* v. *Howell*, 26 Ore. 527; *Delz* v. *Winfree*, 80 Tex. 400; *Robertson* v. *Parks*, 76 Md. 118; *Kimball* v. *Harman*, 34 Md. 407; *Laverty* v. *Vanarsdale*, 65 Pa. St. 507; *Hunt* v. *Simonds*, 19 Mo. 583; *Bradley* v. *Pierson*, 148 Pa. St. 502; Cooley on Torts, 125, 126, 278; *Bowen* v. *Matheson*, 14 Allen 499; *Boston Glass Manufactory* v. *Binney*, 4 Pick. 425; *Walker* v. *Cronin*, 107 Mass. 555; *Steamship Co.* v. *McGregor*, L. R. 21 Q. B. 544; *Steamship Co.* v. *McGregor*, L. R. 23 Q. B. 598; *Schulten* v. *Brewing Co.*, 28 S. W. 504; *Randall* v. *Hazelton*, 12 Allen 415.

W. A. Lord, *John H. Senter* and *Dillingham, Huse & Howland*, for the plaintiffs, cited, *Oxley Stave Co.* v. *Coopers' Int. Union*, 72 Fed. R. 695; *Arthur* v. *Oakes*, 63 Fed. R. 310; *Callan* v. *Wilson*, 127 U. S. 540, 555; *State* v. *Glidden*, 55 Conn. 46, 75; *Temperton* v. *Russel*, L. R. (1893), 1 Q. B. D. 715; *State* v. *Stewart*, 59 Vt. 273; *State* v. *Dyer*, 67 Vt. 690.

MUNSON, J. On the sixth day of June, 1893, the plaintiffs obtained a bond for the conveyance of a mill in Barre, equipped with machinery for polishing granite; and on the sixteenth day of the month they received a deed and took possession of the property, and became co-partners under the name of the Boutwell Polishing Company. The mill had been operated for several years by the plaintiffs' grantor; and in the interval between the taking of the bond and the receipt of the deed, the plaintiffs saw the patrons of the mill and received assurances of a continuance of their custom, limited in the case of some patrons by the mention of an expectation or a possibility of their putting in polishing machines of their own. From the time of their purchase until November the work of the mill averaged over one thousand dollars a month, that of the last month being but little below that amount. In November the

receipts were some less than two hundred dollars. In December and January the mill was without work, and substantially all that it did after that was upon stock purchased by the company from parties outside of Barre. On the nineteenth of April, 1894, the mill was sold to one of the defendants. No complaint was ever made of the plaintiffs' work or their methods of business.

During this time there was an organization in Barre called the Granite Manufacturers Association, which embraced about ninety-five per cent. of all the granite manufacturers in the place. There was also an organization located at Boston, called The Granite Manufacturers Association of New England, with which were connected the local organizations of the New England states, including that at Barre. All the defendants held by the verdict were members of the Barre Association. Neither the plaintiffs' firm nor any of its members were connected with this or any similar organization. Prior to November, 1893, the Barre Association adopted by-laws which prohibited dealings with members not in good standing, and imposed fines for the violation of its rules. On the tenth of November, the Association endorsed a resolution previously adopted by the New England Association, which recommended that none of its members sell any rough stock, partly finished or finished granite, directly or indirectly, to any firm, individual or corporation, engaged in cutting, quarrying or polishing granite in any of the New England states or in New York city, and not a member of the Association. On the twenty-fourth of November, the Association adopted a resolution of the following terms: "Resolved, for the purpose of strengthening the Association, and [for] the mutual protection of its members, [that] no trade shall be conducted with any individual, firm or corporation, engaged in cutting, quarrying or polishing granite, in the State of Vermont, who are not members of this Association."

George Lampson, a defendant, testified that he assisted in

the formation of both associations, and had been connected with them ever since; that he was notified by a circular of the action taken November tenth; that the effect of that resolution would be that if a company declined to join the association, no member of the association would thereafter do any business with it. Alexander Gordon, another defendant, testified that he understood that the main reason for the collapse of the plaintiffs' business was the passage of the resolution; that he voted for it, and did so believing that it would have that effect on their business; that after its passage he stopped sending work to the plaintiffs, and that he did so because of that vote.

It appears from the testimony of some of the defendants that during the summer and early fall of 1893 they had several conversations with John W. Dillon, the manager of the plaintiffs' business, in regard to their becoming members of the Association, in which they expressed a desire to have them join. Mr. Kemp, one of the plaintiffs, testified that sometime in November, and after the loss of their business, defendant Kelliher asked him why they wouldn't join the Association, and said they would find out that they would have to join it before they could do any business. Mr. Senter, an attorney for the plaintiffs, testified that in December, defendant Eagan, on coming out from an interview with the plaintiffs, said to him that "they would find out they couldn't do any polishing business until they joined the Association." Mr. Kemp further testified that in January, 1894, he had two interviews with certain defendants, at their suggestion, in which the question of plaintiffs joining the Association was discussed at length. His testimony tended to show that the first of these meetings was with defendants Ady and Gordon, and that Ady remarked that the object of the interview was to see if they could induce the plaintiffs to join the Association, but that they hardly expected to get them to, as they supposed plaintiffs were still stubborn about joining; that later in

the conversation he used substantially these words, "I will admit that the effect of that resolution was to destroy the business of your company in one day, but it is my opinion that if you will join the Association you can get your business all back in one day," and that Gordon, on being appealed to by Ady, affirmed his statement; that the second of these interviews was with the defendant J. D. Smith, who said it was true that the action of the Association had had the effect to close plaintiffs' mill, but that he was perfectly confident that it could be started up with all their old customers at once, if they would join the Association.

The defendants have not brought up their exceptions to the charge, but stand on their motion that a verdict be directed for want of sufficient evidence to make them liable. There was clearly evidence tending to show that the defendants undertook to compel the plaintiffs to join the Association by depriving their mill of work, and that they made use of their organization, as a means of concerted action, to accomplish their purpose. But there was no evidence tending to show that the defendants made any attempt to compel persons, not members of the Association, to withhold their patronage, and they insist that they cannot be made liable for simply withholding their own.

The crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means. *State* v. *Stewart*, 59 Vt. 273. But the grounds of recovery in a civil suit are not identical with the elements of the crime. The law punishes the mere agreement to effect an illegal purpose or to use illegal means. But it is clear that a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement; and it is claimed to be also requisite that the thing done be something unlawful in itself. This would preclude a reliance upon the existence of an illegal purpose, and require that the means used be

illegal. The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement and resulting in damage, even though not itself a violation of right, would sustain a recovery. But the view suggested is not sustained by the authorities, and we proceed with our inquiry upon the assumption that there can be no recovery unless illegal means were employed.

It is clear that everyone has a right to withdraw his own patronage when he pleases, but it is equally clear that he has no right to employ threats or intimidation to divert the patronage of another. If it be true as a general proposition that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means. The defendants insist that as members of the association they had a right to resolve to keep their work among themselves, and that in the absence of anything tending to show an attempt on their part to influence the action of others, they cannot be held liable. It may be true that if the defendants, acting independently of any organization and moved solely by similarity of interest and views, had united in withdrawing their patronage, the effect upon the plaintiffs' business would have been the same, and yet the defendants have incurred no liability. But in the case supposed the united action would result from the free exercise of individual choice. It will be seen upon further inquiry that this cannot be said of the action of an organization like that operated by the defendants.

It is true, as suggested in argument, that every one engaged in business is liable to have it injured or destroyed by the action of those upon whom he depends for patronage. But when those upon whom he depends for patronage are acting as individuals, he has a measure of security in the

probability that different preferences will be shown by persons left to their own choice; and if some who desire to injure his business secure the cooperation of others by unlawful means, the law gives him a remedy. If the defendants are right, he can be deprived of this security and this remedy by converting those who desire his injury into the majority of an association, and those who do not into a suppressed minority, held to the designated course by the pressure of a system of fines and penalties. But giving a new face to an old wrong can never defeat the remedy, for the law will inquire as to the substance of the thing complained of. If the plaintiffs were in fact injured by a forced withdrawal of patronage secured through the action of defendants' organization, they are entitled to redress. Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion. In this case, it could easily be found that a fine of fifty dollars for a violation of the rules was not intended to be applied to rules adopted to secure a performance of the ordinary duties of membership. If in fact designed to hold unwilling members to unity of action in an aggressive movement of unlawful character, the defendants cannot complain if the law so treats it. The jury could properly infer from the nature and management of the defendants' organization that their united action was due in part to the means adopted to secure it. The force of the measure resolved upon lay partly in the fact that the by-laws threatened penalties against any who should fail in carrying it into effect.

The fact that the members of the association voluntarily assumed its obligations in the first instance, so far as it be a fact, is not controlling. The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body, cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victims of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association. But it can hardly be supposed that the defendants' organization reached its present proportions without some previous use of the methods disclosed by the evidence above recited; and as far as its membership was due to coercion, there was a further element of unlawful pressure in the enforcement of united action against the plaintiffs. It would be strange indeed if the members of an association, organized upon such a basis and advanced by such means, could meet a claim of this nature by saying that they had made no attempt to secure the cooperation of outside parties. It is clear that if the association had comprised but a small portion of the manufacturers, and had destroyed the plaintiffs' business by compelling other manufacturers to join them in withholding patronage, its members would have been liable. But it is claimed, in effect, that a business can be destroyed with impunity, when the organization has become so extensive that there are no outside patrons to

control, or so few that their course is a matter of no moment. Upon this theory, every successful instance of coercion would increase the safety with which another coercion could be attempted, and when coercion had been pursued until but one contumacious person remained, immunity would be complete. It is clear that the law cannot concede to organizations of this character the powers and immunities claimed for their association by these defendants, and retain its own power to protect the individual citizen in the free enjoyment of his capital or labor.

The evidence excepted to was properly admitted. Evidence that defendants individually expressed a purpose to continue to patronize the mill, in connection with evidence that they did so without complaint until the general withdrawal, was evidence tending to characterize the withdrawal when made. The items offered as showing the profit of the mill tended to establish the damages according to the rule adopted by the court, and no question is now made as to the correctness of that rule. Evidence of the existence and rules of the New England Association was admissible because of the connection of that body with the local organization. The resolution and by-laws of the Barre Association, the agreement of that association with the Boston Wholesalers Association in restriction of the sales of its members, the appointment of a committee to inquire as to violations of its rules, the official correspondence had with one of its members upon that subject, the fact that a fine was imposed for an ascertained violation, and the action of the association in assuming the defence of its secretary when sued because of a letter written in respect to an alleged violation,—were all admissible as showing the purpose and use of the organization, and its coercive character as against its own members. The statements of different defendants indicative of their purpose, and of members of the association not defendants as to the force

and effect of the vote, made contemporaneously with and in explanation of their action under it, were clearly admissible.

The case stands upon grounds which are inconsistent with the allowance of exemplary damages; for damages of this nature, if ever recoverable against several defendants, are recoverable only where all are shown to have been moved by a wanton desire to injure. The exemplary damages were separated by a special verdict, but were included in the judgment rendered.

Judgment reversed, and judgment for actual damages with interest from date of judgment below.

C. H. & H. J. DAVENPORT *vs.* MOSES NEWTON, et al.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START, and THOMPSON, JJ.*

Opinion filed November 7, 1898.

Tax Title.—A purchaser of land at a tax sale acquires no title nor color of title unless the sale is followed by a deed from the collector.

Constructive Possession.—One's possession is not to be extended by construction beyond the limits of his deed; but the presumption is that he has claimed in accordance with his deed.

Adverse Possession.—Although occupation is a fact, the effect of it, when its nature and character appear, is a matter of law. Therefore, in order to set the statute of limitations in operation, it must be such in fact that in law it works a disseisin of the owner, and to have that effect, it must possess all the elements of adverse possession. But even

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*NOTE BY ROWELL, J. This case was first argued at the January term, 1898, before all the judges but *Munson*, J., who was engaged in county court. It was further argued at this term on the last two points, which were not touched upon before, all the judges being present but *Tyler* and *Start*, JJ., who were engaged in county court; but *Tyler*, *Munson* and *Start*, JJ., concur in the whole opinion.

an occupation not such as to ripen into title against the owner may be good as against strangers.

Possession by Wrongdoer.—Even a tortfeaser may maintain trespass against a stranger who disturbs his possession.

Possession, an Estate.—A possession under color of title, though not of such a character as to ripen into title against the true owner, is an estate, and may pass by deed.

Abandonment.—If one receiving such an estate by deed omit all acts of possession for a long series of years, such omission will not of itself, as matter of law, constitute an abandonment, for abandonment is a question of fact.

Constructive Occupation.—If one have separate deeds of lots A and B, acquired from different sources at different times, his actual occupation of A will not amount to constructive occupation of B.

Province of Referee.—It was within the province of the referee to find that a letter which the defendants claimed was an acceptance of the offer contained in a letter from one of the plaintiffs, was in fact only a memorandum of a contract to be afterwards formally drawn up.

Acceptance.—An acceptance must conform exactly to the terms of the offer.

Director's Liability.—To make a director of a corporation personally liable for its acts, he must have done something that makes them his acts also; the mere fact that he is one of a board of directors is not enough.

Nonsuit.—The history of the right to enter a non suit or nol. pros. reviewed.

Nonsuit Permitted.—Treating the question as matter of discretion at this stage of the case, without considering whether it would be matter of right at some other stage, the court permits the plaintiffs to enter a nonsuit as to one of the defendants, as otherwise the plaintiffs will lose a substantial part of their damages by lapse of time, such released defendant not being liable for the whole amount, and the plaintiffs not being considered at fault in failing to sooner discover the fact.

Treble Damages.—The plaintiffs, who by reason of their actual possession are entitled to maintain trespass against the defendants as mere strangers to the title, are nevertheless not entitled to treble damages under the statute, being themselves only trespassers as against the real owner, for whose benefit, not theirs, the statute was enacted.

TRESPASS on the freehold, with a claim for treble damages under R. L. 4206. Pleas, the general issue and two special pleas. Upon the report of a referee at the December term, 1896, Bennington county, *Thompson*, J., presiding, judgment was rendered, *pro forma*, for the defendants to recover their costs. The plaintiffs excepted.

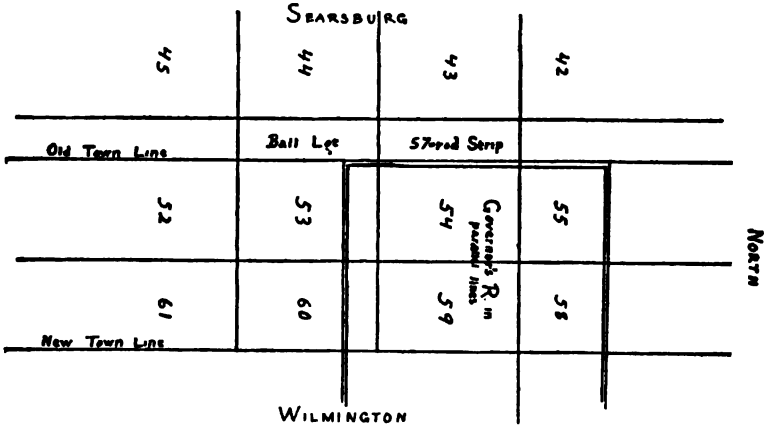
A stipulation was filed to the effect that a *pro-forma* judgment might be rendered for the defendants upon

condition that no claim which the plaintiffs might have urged before the county court, either for treble damages or otherwise, should be waived or prejudiced.

Waterman, Martin & Hutt for the plaintiffs.

Charles S. Chase and *J. K. Batchelder* for the defendants.

ROWELL, J. This is trespass on the treble-damage act for cutting timber-trees on land in Searsburg. The *locus* consists of that part of lot No. 53 that lies west of the old town line, called the Ball Lot; the rest of 53, except a strip



on the north end that belongs to the Governor's Right; and of that part of lot No. 54 that lies west of said old line, called the 57-rod strip.

The plaintiffs claim title by adverse possession only; and failing that, they claim a possessory title sufficient to enable them to maintain trespass against the defendants, who are strangers to all title.

The defendants concede the cutting, but deny that the plaintiffs have either title or possession; but if they have, leave and license from them is claimed.

The first deed of the Ball Lot is a warranty deed from Origin Ball to Ebenezer Stone, dated August 28, 1834, which describes the land as bounded south by lands owned by

Cassander Flagg, formerly owned by Benoni Davis; east by Wilmington west line; north and west by lots and lands unknown; containing fifty acres, and known by the name of the Ball Lot.

Ebenezer Stone deeded the same to Amos Wentworth on July 1, 1836, and Wentworth deeded it to Ashley Stone, with other lands, on February 15, 1838; and both deeds contain substantially the same description as Ball's deed to Ebenezer Stone.

On May 10, 1839, the whole of lot 53 was sold to Ashley Stone for taxes, and the whole of 54, to Walter Goodnow. The collector deeded to Goodnow on May 9, 1840, describing the land as "lot No. 54, in the second division, drawn to the original right of John Williams, estimated to contain 164 acres;" but it does not appear that he ever deeded 53 to Ashley Stone nor to any one else.

On June 10, 1841, Goodnow quitclaimed 54 to said Stone, describing it as it was described in the collector's deed to him.

On February 27, 1845, said Stone gave to Ezra T. Butterfield a warranty deed of the Ball Lot and of the whole of 54, describing the Ball Lot as bounded south by the Flagg Lot, so called; east by lands the owner of which was unknown; north by lot 54, second division according to the Searsburg survey; and west by lands of Solomon Rich; containing by estimation fifty acres, and known by the name of the Ball Lot; and describing lot 54 by its number and division, according to said survey and plan of Searsburg, being the same theretofore deeded to the grantor by Walter Goodnow, as would appear of record; and on the same day Stone quitclaimed to Butterfield the rest of 53 not included in the Ball Lot, according to the original survey and plan of Searsburg, estimated to contain a hundred acres. Butterfield, therefore, had deeds of the whole of 53 and 54; and on September 8, 1847, he gave to Horatio B. Smith and A. D. Smith a warranty deed of the

Ball Lot and of lot 54, describing them as they were described in his deed from Stone, and on the same day he quitclaimed to said Smiths the rest of 53 according to the original survey and plan of Searsburg, estimated to contain a hundred acres; and so the Smiths had deeds of the whole of 53 and 54.

On March 8, 1861, Emily S. Smith, widow of Horatio B. Smith, and executrix of his will, which was duly probated, deeded to Charles N. Davenport, Eleazer Gorham, and A. L. Wilder, lots 53 and 54 according to the survey and plan of the town, intending thereby to convey all the lands in Searsburg of which her husband died seized and possessed, and all the lands conveyed to him and A. D. Smith by said Butterfield as aforesaid or otherwise; and on June 10, 1861, Wilder quitclaimed said lots to Davenport, and Gorham quitclaimed them to him November 15, 1861, both referring to Mrs. Smith's deed for description. So Davenport had deeds of both of said lots, but it does not appear that A. D. Smith ever deeded them to any one.

On September 5, 1839, Cassander Flagg deeded to Anna Flagg fifty acres, more or less, of that part of lot 52 lying between the old town line and lot 45, and on October 13, 1841, she deeded the same to Ashley Stone. We suppose this to be the land on which Stone lived when he occupied the Ball Lot as below stated.

On March 27, 1877, said Davenport deeded to Hermon Holt, administrator of the estate of David H. Sumner, all of lot 59, that part of 54 lying east of the old town line, and that part of 53 and 60 that is included in the Governor's Right.

Said Davenport died April 12, 1882, and the plaintiffs are his heirs and claim as such, and it is conceded that they have whatever right and title he had to the *locus* when he died.

Ashley Stone's bidding off 53 at the tax sale of 1839 gave him no title nor color of title, as the sale was not followed

by a deed from the collector, *Langdon* v. *Templeton*, 66 Vt. 173, and as it does not appear that he ever occupied any part of it except the Ball Lot, his occupancy thereof must be confined to that lot; and his possession of that cannot be extended by construction to the rest of 53, for the presumption is that he was claiming only according to his deed, which covered only the Ball Lot. It is found that he claimed to own the Ball Lot, and occupied it some seven years, living meantime on lot 52 south of and adjoining it. These were probably the years during which he had a deed of it, namely, from 1828 to 1845. But the nature and character of that occupancy do not appear, unless we assume what is not found, that he cleared the whole or a part of the lot, as it appears that it was cleared before Davenport bought it in 1861, but when or by whom does not appear; hence it is claimed that Stone's possession of the lot does not appear to have been such as would ripen into title against the owner, and that therefore it is not available to the plaintiffs here. Although occupation is a fact, the effect of it, when its nature and character appear, is matter of law. *Child* v. *Kingsbury*, 46 Vt. 47. Therefore in order to set the statute in operation, it must be such in fact that in law it worked a disseisin of the owner, and to have that effect it must possess all the elements of adverse possession, so that it will ripen into title in the requisite time. Stone's occupancy does not appear to have been such, as there is nothing to show its character except that it was under claim and color of title, which is not enough. But it is not necessary that it should have been such as to ripen into title against the owner in order to be good against strangers, for possession may be good against one man and not against another. If there is a tortious possession not amounting to a disseisin, the constructive possession as between the tort-feasor and the one having the legal title is deemed to continue in him who has the right; but the tort-feasor may, nevertheless, maintain

trespass against a stranger who disturbs his possession, and the stranger cannot defend by saying that the tort-feasor's possession is the possession of the true owner, for being a stranger, he is not connected with the title of the owner. *Langdon* v. *Templeton.*

Now Stone's possession of the Ball Lot, though not amounting to disseisin, was good against strangers, and he could have maintained trespass against them for disturbing his possession, for he had a deed of the lot and was in occupancy of the whole of it, as we construe the report, and claimed ownership under color of title, and that possession was an estate, and passed by deed from Stone to Butterfield. And although it does not appear that Butterfield did any act upon the lot during the two years and a half that he held a deed of it, yet if he did not, that fact does not of itself and as matter of law constitute an abandonment of the possession he acquired from Stone, for whether a prior possession has been abandoned or not is a question of fact, to be determined from the circumstances of the case, and there is no finding of abandonment here. *Langdon* v. *Templeton*, above cited; *Patchin* v. *Stroud*, 28 Vt. 394. Hence it must be held, in view of the character of the land, that at the time Butterfield deeded to the Smiths in 1847, he was still in possession of the lot—*Langdon* v. *Templeton*—and that his possession passed to the Smiths by his deed to them, the same as Stone's possession passed to him. And although it does not appear that the Smiths ever did any act upon the lot during the about fourteen years they held a deed of it, yet, as there is no finding of abandonment by them, it must be held that they or their legal representatives were in possession when Mrs. Smith deeded to Davenport, Gorham and Wilder, and that her deed transferred that possession to them, or at least the possession of her testator, so that they had possession under claim and color of title; and it is clear from the facts found that Davenport, who soon bought out Gorham and

Wilder, not only did not abandon that possession, but supplemented it by an entry of his own, claiming title, for in 1864 or 1865 he caused a fence to be built between the lot and Boyd's on the south, with the declared purpose of pasturing horses there, and it is found that he did pasture horses there, though on inadmissible testimony, we think, and he occasionally went upon 53 and 54, and had a local agent to look after his lands there, and always paid taxes on them.

But as to 54 and the rest of 53, it does not appear that any of those under whom Davenport claimed ever had actual possession of either, nor that Stone ever had constructive possession, for his possession of the Ball Lot did not extend by construction to the rest of 53, for the reason above stated; nor did it extend to 54, for although he had color of title of it, as his deed from Goodnow described it by number and division, naming the original proprietor, and it fairly appears from the report that the town was allotted, or at least that portion of it in which these lots are located, yet his deed was obtained from a different source and at another time.

Nor did Butterfield nor the Smiths have constructive possession of that part of 53 not constituting the Ball Lot, as they held that by a separate deed, though obtained from the same source and at the same time. Whether by obtaining possession of the Ball Lot as they did they thereby acquired constructive possession of 54, upon which they never entered, it is unnecessary to inquire, for Davenport acquired possession of both 53 and 54 by his entry on the Ball Lot, which was a part of 53, as his deed embraced both lots; and as the Ball Lot was a part of 53, his entry upon that, claiming all that his deed covered, as he did, gave him, in contemplation of law, possession of all—*Webb* v. *Richardson*, 42 Vt. 465—and that possession was sufficient to have enabled him to maintain trespass against one entering without right upon any part of the

lots. *Green* v. *Pettingill*, 47 N. H. 375: 93 Am. Dec. 444, and note.

But it does not appear that his entry and possession were such as to make them adverse to the owner, for the fence between the Ball Lot and Boyd's, the building of which was the most hostile act shown, no more indicated that it was for the purpose of occupying the Ball Lot than Boyd's lot, and so it was no notice to the owner of the former of an adverse possession of it. But his possessory title descended to the plaintiffs; and while it does not appear that they have done anything upon or concerning the lots except to run the lines, pay the taxes, and redeem them from two tax sales, this shows that they have not abandoned possession, but have kept up their claim of title, and therefore their possession of the entire *locus*, though not adverse to the owner, is good against the defendants; but they concede that they cannot recover against Daniel H. Newton, for it does not appear that he had anything to do with the cutting. Moses Newton, John C. Newton, and Willard Sumner are the only other defendants, as The Deerfield River Company, a corporation against which the writ runs, was never served with process.

The plaintiffs also claim that the statute makes their title to 54 good against the defendants. It provides that when lands have been listed to a grantee in a collector's deed, duly recorded, or to his grantees, for a period of twenty years or more, and taxes paid thereon by said grantee or grantees, the title to said lands shall be legal and valid in the person claiming under such conveyance, against every person who subsequently enters upon such lands without having any legal right thereto. V. S. 491. But we do not decide this. In *Downer* v. *Tarbell*, 61 Vt. at page 533, it is said that the validity of that act is questionable. We express no opinion about it, as it would not, if the claim is sustained, give the plaintiffs the fee, but only such title as they have without it.

The defendants claim that the referee exceeded his province in finding that there was no contract between the plaintiffs and said company, giving the defendants a right to cut, for that the letters that passed between them made a contract as matter of law. But we think the finding must stand, for the referee finds that the plaintiff, C. H. Davenport, was justified in considering and treating the company's letter to him, which the defendants claim was an acceptance of the offer contained in his letter to Sumner, the company's agent, as a memorandum of a contract to be formally drawn up, as suggested in his letter, when his brother, who was better informed in such matters, could consider the correspondence and the conditions of the bargain when the papers were ready for consideration and signing by both parties; and that neither the company nor John C. Newton, who signed it as treasurer, supposed it would close the contract without something further. This finding was within the province of the referee, and warrants the finding that the minds of the parties never met.

There is another ground on which it is clear that there was no contract. C. H. Davenport's letter to Sumner offered to sell "the lumber at one dollar per thousand, in the way and on the condition indicated when you were here," referring to a conversation they had had about the matter, which, it is found, "looked to the taking of all the timber upon the lands claimed by the plaintiffs, whether the titles were in controversy or not." The company's reply accepted the offer as to price, for the spruce and fir on 53 and 54 and on twenty-five acres of lot 51, which were not all the lands claimed by the plaintiffs, but did not refer to disputed titles, and said that the logs were to be cut and delivered according to the specifications of a contract with Sumner for a period of two years, and that payments would be made between the 15th and the 25th of each month for all stumpage, according to the log scale of the previous month, measured according to Scribner's old log rule. The

plaintiffs knew nothing about the contract with Sumner, which was of the same date as the company's letter, and provided for cutting only spruce and fir on 53 and 54 and said twenty-five acres, to be cut into logs twelve feet and four inches long for twelve feet, and to scale not less than eight inches in diameter at the top. All this, except the price, either fell short of or went beyond the things indicated in the conversation referred to in Davenport's letter, and so the company's letter was no acceptance; for an acceptance, to be good, must be such as to conclude a contract between the parties, and to do that, it must in every respect meet and correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. *Potts* v. *Whitehead*, 23 N. J. Eq. 512. An acceptance on terms varying from those proposed is, in effect, a counter proposal, and is not binding until it is itself accepted. Benjamin's Principles of Contracts, 13. And such counter proposal is a rejection of the offer, and puts an end to the negotiations, unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. *Minneapolis, etc., Railway Co.* v. *Columbus Rolling Mill*, 119 U. S. 149; *National Bank* v. *Hall*, 101 U. S. 43; Benjamin's Principles of Contracts, 13.

The cutting complained of began October 1, 1888, and ended March 21, 1890. It appears that on October 1, 1889, The Deerfield River Company, of which all the Newtons were directors and Moses and John were managers, sold some of its mills, timber lands, and whatever right it had or claimed to have to cut timber on the lands in question, to The National Metal-Edge Box Company, a corporation of which Moses and John were also directors, and that thereafter John had nothing to do personally with reference to said lands nor the cutting of timber thereon,

but that Moses had charge of the Box Company's business of cutting timber in this State. On these facts the claim that John is not liable for the cutting done after the River Company sold out is well founded, for to make a director of a corporation personally liable for its torts, he must have done something that makes them his torts also; the mere fact that he is one of a board of directors is not enough, and here nothing more appears.

Fanning v. *Osborne*, 102 N. Y. 441, is much in point. There, a partnership, of which the defendant Osborne was a member, maintained and operated a street railroad for a time, and then became incorporated, and the corporation succeeded to the business of the firm. Osborne managed the road under the firm, and was president of the corporation, but it did not appear that he did any act in respect of the road after the corporation took it, nor that he advised or approved the corporation's acts, and for that reason it was held that he was not liable for damage done by the corporation in operating the road. The law of this subject is pretty fully discussed in *Nunnelly* v. *Southern Iron Co.*, 94 Tenn. 397: 28 L. R. A. 421 and note. It is said in a monograph note on this subject in 48 Am. St. Rep. at page 922, that the only question of which there can be any serious doubt in this class of cases is, whether the officer or agent has participated in the wrong so that it may justly be regarded as his act; that if he has, his liability is indisputable.

This being so, the plaintiffs ask leave to become non suit as to John, that they may take judgment against the other defendants for the full amount, as they are liable for the whole time; and if such leave is not grantable, they ask leave to enter a retraxit or a remittitur as to John; and if not entitled to that, they ask that judgment be entered for him and against the others. To all this the defendants object for divers reasons, and one is, that if judgment passes against Moses Newton and Sumner only up to the time the

River Company sold out all after that is outlawed, so that they could not be made liable therefor in another action, and hence should not be in this by letting John out.

At the common law a nonsuit, in strictness, could be entered only at the instance of the defendant. 2 Tidd Pr. [*868]; *Arnold* v. *Johnson*, 1 Str. 267. Lord Coke says that a nonsuit is ever upon demand made when the plaintiff ought to appear but does not. 1 Co. Litt. [138b]. A *nol pros.* is, in effect, like a nonsuit, and is the same as in modern practice is the dismissal of an action for want of prosecution. By 14 George II. c. 17, s. 1, judgment as in case of a nonsuit could be rendered against the plaintiff in some cases although he appeared. In *Dow* v. *Hinesburgh*, 2 Aik. 18, 26, judgment for the defendants "as upon a nonsuit" was rendered in the supreme court on motion of the plaintiff and after verdict against him. The court said that the general rule is that a nonsuit shall not be entered after verdict, but that, for the furtherance of justice, the court will sometimes permit it. In *Squires* v. *Burgess*, 31 Vt. 466, the plaintiff entered a nonsuit below, and the defendant moved to strike it off, which was denied, and he excepted. This court said that the whole matter of allowing a suit to be stopped without any judgment except that the plaintiff go out of court with his claim, and of vacating such entries, rests in the discretion of the court in which the case is pending. We have not adhered strictly to the common-law idea of a nonsuit, but allow a plaintiff to become nonsuit on his own motion, and indeed at certain stages of the case he may become nonsuit as matter of right, as was held in Caledonia county many years ago, we are told.

By the common-law nonsuit the plaintiff goes out of court as to all the defendants, the same as he does by a *nol pros.*, and therefore when he desires to go out of court only as to some of the defendants or as to a part of his declaration, a *nol. pros.* is probably the most apt way of

doing it, though we are little accustomed to that in civil cases.

It is said by Mr. Sarjeant Williams in his note to *Salmon* v. *Smith*, 1 Saund. at page 207, and what he says is approved and adopted by the supreme court of the United States in *Minor* v. *The Mechanics' Bank of Alexandria*, 1 Peters 46, 74, that the nature and effect of a *nolle prosequi* in civil cases were not accurately ascertained and defined till modern times, and that the old authorities are contradictory and confused upon the subject; that in some of them it was considered as a retraxit, operating to release or discharge the action, and an absolute bar to another action for the same cause, and that therefore in trespass against two who pleaded several pleas, it was held that if the plaintiff entered a *nol. pros.* against one before he obtained judgment against the other, it would defeat the action as to both, but that in other cases, which have been adhered to ever since, a *nol. pros.* is considered not to be of the nature of a retraxit, but only an agreement not to proceed either against some of the defendants or as to some part of the suit, and that it may be entered as to one defendant before judgment against the other, notwithstanding the former cases. In Minor's case, above cited, Judge *Story* defines a *nol. pros.* in a civil case to be a "partial forbearance by the plaintiff to proceed further as to some of the defendants or as to some part of the suit, but still he is at liberty to go on as to the rest." And both he and Mr. Serjeant Williams say that in cases of tort against several, though they all join in the same plea and are found jointly guilty, yet the plaintiff may after verdict enter a *nol. pros.* as to some and take judgment against the rest; and the reason is, that as such actions are joint and several, the plaintiff might originally have sued one and obtained judgment and execution against him alone, and therefore he may, after verdict against several, elect to take his damages against any of them. Judge *Story* further says that it does not seem to have been denied that cases in tort

might arise in which, if the defendants severed in their pleas, the plaintiff might, after judgment against one, enter a *nol. pros.* as to the others; but that the doubt was, whether he could do that before judgment, which was finally settled in favor of the right, and that after that, when several damages in actions of tort were assessed against different defendants, the difficulty was cured by entering a *nol. pros.* as to all the defendants but one. As we have seen, it makes no difference in this respect whether the defendants join or sever in their pleas.

Minor's case was debt on a joint and several bond. The sureties severed from the principal in their pleas, and judgment was given against them before the principal appeared. After he appeared and pleaded severally, a *nol. pros.* was entered as to him, and the question was whether that was error for which the judgment against the others should be reversed, and held no error. The court said that the authorities, and particularly the American, proceed upon the ground that the question of entering a *nol. pros.* is matter of practice, to be decided upon considerations of policy and convenience rather than matter of absolute principle, and that therefore the court was left at full liberty to make such a decision as its own notions of general convenience and legal analogies would lead it to adopt; and it was of opinion that where the defendants sever in their pleadings, a *nol. pros.* ought to be allowed, as it is a practice that violates no rule of pleading, and would generally subserve the public convenience, and that in the administration of the law, matters of form not absolutely subjected to authority may well yield to the purposes of justice. Mr. Dane says in the 5th volume of his abridgment at page 676, that if the plaintiff enters a *nol. pros.* it is his own free act, and that the only question is, when will the court permit him to do it?

Treating this question as matter of discretion at this stage of the case, without considering whether it would be

matter of right at some other stage, we think that justice will be helped on by allowing a *nol. pros.* or a nonsuit—and it makes very little practical difference which it is called—to be entered as to the defendant John C. Newton; and all the more, because otherwise the plaintiffs will lose a substantial part of their damages by lapse of time, for which it does not appear that they are to blame; nor does it appear that they were culpably negligent in not sooner finding out that John was not liable for all the trespasses, for he was so connected with both companies and their business that it might have been hard to tell whether he was liable for all or not.

The plaintiffs claim treble damages. The statute provides that "if a person cuts down, destroys or carries away trees placed or growing for use, shade or ornament, or timber, wood or underwood, standing, lying, or growing on the land of another person, without leave from the owner of such lands," * * * "the party injured" may recover of such person treble damages in an action on the statute; and the question is, whether the plaintiff, in order to recover treble damages under this part of the statute, must be the owner of the land, or whether possession under claim and color of title is enough. This statute does not create the right of action, but only gives cumulative damages for what was and still is actionable at common law. *Montgomery* v. *Edwards*, 45 Vt. 75. It was first passed in 1787, when the action was given to "the party injured or trespassed upon." Sts. of 1787, p. 160. In the Sts. of 1797, p. 187, the words, "or trespassed upon," were omitted, and they have never been restored. The revision of 1839 imposed a fine for wilfully and maliciously cutting trees on the lands of private persons, and repealed the treble damage act. R. S. c. 95, § 23, and c. 111, § 12, p. 516. But in 1849 it was reenacted in substantially the same language that it is in now. Acts 1849, No. 12.

When we consider the object of the statute, which is, as declared by the Act of 1787, "to punish trespasses in divers cases," and by the Act of 1797, "more effectually to prevent" them, it seems clear that the purpose is to protect the owner of the land, and not a trespasser upon him, though having a possession good against a stranger, for such a trespasser would himself be under the ban of the statute if he committd the acts therein specified. And the language of the statute imports this, for the prohibition is, "without leave from the owner of such lands." This means a leave good against the owner, and he alone can give that. If the possessor as distinguished from the owner was meant, the language should have been, "the owner or possessor." But as the possessor is not named, we infer he is not intended. This precludes the idea that the "party injured" may be other than the owner of the land, for, in a just sense, no one can be injured but the owner. But whether the plaintiff must be owner in fee in order to recover under the statute, or whether one claiming under such owner can recover, it is unnecessary to decide, for these plaintiffs are neither, but are trespassers as to such owner, as they have not disseised him, though they have possession good against a stranger, and are in under claim and color of title. Such plaintiffs are not the party injured, within the meaning of the statute, and therefore cannot recover treble damages. In Illinois, the word "owner" in a statute similar to ours in its general provisions, has been repeatedly held to mean the owner of the fee. *Jarrot* v. *Vaughn*, 7 Ill. 132; *Abney* v. *Austin*, 6 Ill. App. 49. A similar statute in Michigan has received the same construction. *Achey* v. *Hull*, 7 Mich. 423. In Mississippi it is held that as the cutting of trees is an injury to the freehold, the plaintiff claiming the statutory penalty must be the real or apparent owner of the freehold, but that possession under claim and color of title will ordinarily be sufficient. *McCleary* v. *Anthony*, 54 Miss. 708.

If the omission of the words, "or trespassed upon," from Sts. of 1797, is to be given any effect, it makes in favor of the construction we adopt.

Judgment affirmed as to Daniel H. Newton, but reversed as to the other defendants, and judgment of nolle prosequi as to John C. Newton, with costs, and judgment against Moses Newton and Willard Sumner for $760.16, that being the value of all the timber cut as found by the referee, with interest thereon by way of damages from March 21, 1890, the end of the cutting, to the first day of this term.

HOPE S. PAINE, admr., *vs.* LEONARD McDOWELL and M. E. TUCKER.

May Term, 1898.

Present: TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed October 3, 1898.

Transaction Equivalent to Deed and Mortgage.—By a written agreement between Paine and McDowell, it was recited that Paine was the owner of the lot in question, and had bargained it to McDowell, and that McDowell had given Paine his notes therefor, and provided that when the notes were paid Paine should quit claim the farm to McDowell. *Held*, that the transaction was equivalent to a deed and mortgage back, and that McDowell having taken possession under the contract and never surrendered it, could not, nor could those claiming under him, dispute Paine's title, as by asserting that the deed to Paine from a third party, being only a quitclaim, was not evidence of title, or that the last named deed was given while McDowell was in adverse possession.

Witness; Objection Waived.—The oratrix called the defendant McDowell as a witness and proved by him without objection the making of the said contract with Paine, who had since deceased. *Held*, that she thereby waived her right to object to him for incompetency when subsequently called by the other side.

Trade Fixtures.—The doctrine of trade fixtures applies only as between landlord and tenant.

Fixtures; Exception in favor of Conditional Vendor.—As between mortgagor and mortgagee, in all jurisdictions where the mortgage conveys title, it is the general rule that all fixtures are a part of the land and go with it; but we have made an exception in favor of the conditional vendor of chattels sold to the mortgagor and by him annexed after the execution of the mortgage upon the land; and the same doctrine should operate in favor of one who does not sell the fixtures at all, but merely annexes them under an agreement with the mortgagor in possession that they may be removed at the will of the owner,—especially where, as in the case at bar, they can be removed and leave the mortgagee's security as good as it was before the annexation.

Chattels Annexed under Agreement with Mortgagor in Possession.—After the death of the intestate Paine and the appointment of the oratrix as his administratrix, and before the erection of the buildings in question was commenced, which was in 1893, the defendant Tucker, owning much timber land near by, acting in good faith, supposing the defendant McDowell owned the lot subject to mortgage and had a right to lease it, agreed with him for the use of so much thereof as might be necessary for the erection of a mill thereon, and for yard room and roads to be used in connection therewith in his lumber business, at and for a specified yearly rent as long as the mill should be used, and for a right to remove the buildings and machinery at the end of the term. That fall and winter Tucker built a building on a corner of the lot that adjoined two lots of his, and put into it a sawmill, a dressing-mill, and other machinery, and in 1895 added a box factory and shed and more machinery, all, including the letting by McDowell, being done with the full knowledge of, and without objection by the oratrix, and with no intention on the part of Tucker to improve the real estate. *Held*, that the erections and machinery never became fixtures, but retained their character as chattels as to the oratrix no less than as to McDowell and that Tucker had the right to remove them.

CHANCERY. Heard upon pleadings, master's report, and exceptions thereto, at the February term, 1898, Orleans county, before *Ross*, Chancellor, who sustained the exception to the testimony of McDowell on the subject of payments, and disallowed such payments, and rendered a decree of foreclosure against McDowell for the amount due, and against Tucker, also, but allowing him, under his cross-bill, to remove certain of the property, not including the buildings, boiler, engines and main shaftings. The defendant Tucker appealed.

Bates, May & Simonds for the defendant.

John Young for the oratrix.

ROWELL, J. This is a petition to foreclose the equity of redemption arising under a contract of purchase of a farm consisting of a lot of land in Eden and a lot in Lowell.

The master finds that on August 13, 1878, the intestate owned the lot in Lowell by virtue of a warranty deed thereof from Willard Fuller to Samuel McDowell, dated January 10, 1878, duly executed and recorded, and of a quitclaim deed thereof from the said Samuel to him, dated the 13th of said August, duly executed and recorded. It appears that the defendant Leonard McDowell lived on said farm before and at those times, and has lived there ever since.

On December 21, 1880, the intestate and the defendant McDowell entered into a written agreement, which recited that the intestate then owned said farm and had bargained it to said McDowell, and that McDowell had given him his certain notes and obligations therefor, and provided that if said notes and obligations were paid according to their tenor, and all other legal demands and accounts that the intestate might hold against said McDowell, and the balance due to said Fuller on a mortgage of the Lowell lot, the intestate would quitclaim the farm to McDowell.

This contract gave McDowell an equity of redemption in the premises, and made the transaction in legal effect practically the same as a deed and mortgage back; and as McDowell took possession under the contract and has never surrendered it, neither he nor those claiming under him can dispute the intestate's title, and therefore, as the defendant Tucker claims under McDowell, the objection that the quitclaim deed from Samuel McDowell to the intestate was not of itself, nothing more appearing, evidence of title, can avail nothing, nor can the further objection that said deed passed no title as to the defendant McDowell because

he was then in adverse possession. And it may be remarked that it does not appear that his possession was ever adverse to Samuel McDowell.

The oratrix called the defendant McDowell as a witness, and proved by him without objection the making of said contract and the execution of the notes thereby secured. McDowell was afterwards allowed to testify on behalf of the defendants, among other things, to the making of certain unindorsed payments, which the master found on his testimony alone, and which, on objection that he was incompetent, as the other party to the contract was dead, the court disallowed. The oratrix now concedes that this was error, for that by using him as a witness herself, she admitted his competency, or, rather, waived her right to object to him for incompetency when subsequently called by the other side, according to *Linsley* v. *Lovely*, 26 Vt. 123, 133, cited approvingly in *State* v. *Slack*, 69 Vt. at page 492.

After the death of the intestate and the appointment of the oratrix and before the erection of the buildings in question was commenced, which was in the fall of 1893, the defendant Tucker, owning much timber land near by, acting in good faith, supposing that the defendant McDowell owned the lot in Lowell subject to mortgage and had a right to lease it, agreed with him for the use of so much thereof as was or might be necessary for the erection of a mill thereon and for yard room and roads to be used in connection therewith in his lumber business, at and for a yearly rent of five dollars as long as the mill was used. That fall and winter Tucker built a building on a corner of said lot that adjoined two lots of his, and put into it a sawmill, a dressing-mill, and other machinery, and in 1895 he added to the building a box-factory and a shed, and put in more machinery.

The value of the whole lot does not exceed $300. The buildings are worth $1000, and the machinery therein, $5000. Tucker did not purpose to enhance the value of the

lot by his outlay, but only to provide means for cutting out the timber on his Lowell lot, which he thought would take about six years, and intended, when that was done, to remove the buildings and the machinery to his Eden lot; and the agreement between him and McDowell was that he might do that.

The master finds that the oratrix knew of the letting of the land to Tucker for the purpose for which it was used about the time the buildings were being built, but made no objection thereto. Tucker knew that the lot was under mortgage, and was told that the estate held it; and besides, the records were constructive notice to him that the estate had a quitclaim deed of the land; so he was laboring under no mistake as to the legal quality of McDowell's title.

The oratrix claims that the buildings and the machinery therein are so attached to the land as to become a part thereof as between her and Tucker, and that therefore he has no right to remove them; and she forbade him when he sought to do so before filing his cross-bill.

Tucker claims, on the other hand, that as under his contract with McDowell, who was in possession, he had the right of removal, the erections and machinery never became fixtures, but retain their character of chattels as to the oratrix as well as to McDowell, and that therefore he has the right to remove them as against both; and besides, he invokes the doctrine of trade fixtures. The doctrine of trade fixtures applies only between landlord and tenant, and as Tucker is not tenant to the oratrix, it does not apply as to her. *Fisher* v. *Dixon*, 12 Cl. & F. 312.

But the other claim we think is well founded. It is true that as between the estate and McDowell, all fixtures are a part of the land and go with it. This is the general rule between mortgagor and mortgagee in all jurisdictions where a mortgage conveys title; and in some of them, notably Massachusetts, no exception to the rule is made in favor of third persons, such as conditional vendors and

chattel mortgagees, although the annexations are made after the execution of the mortgage of the land, for they say that the mortgagor cannot bind the mortgagee without his consent by an agreement that the annexations may be removed in a certain event. *Clary* v. *Owen*, 15 Gray 522; *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279; *Meagher* v. *Hayes*, 152 Mass. 228: 23 Am. St. Rep. 819.

But we have made an exception in favor of conditional vendors of chattels sold to the mortgagor and by him annexed after the execution of the mortgage of the land, and held that they do not become fixtures as between the conditional vendor and the prior mortgagee, but retain their identity and character as chattels, and that the vendor's right thereto is superior to that of the mortgagee, and may be asserted against him; and this is put upon the ground that the mortgagee has parted with nothing on the faith of the annexations being a part of the realty, and therefore has no reason to complain. *Davenport* v. *Shants*, 43 Vt. 546; *Buzzell* v. *Cummings*, 61 Vt. 213, 218; *Page* v. *Edwards*, 64 Vt. 124.

This exception, carried to its logical result, exempts the annexations in question from the mortgage, for it makes no difference whether the annexations are sold conditionally or not sold at all. The same reason exists in both cases for treating them as chattels between the mortgagee and the owner, namely, that the mortgagee is not misled by the annexations, and parts with nothing on the faith of them, and therefore does not stand as a *bona-fide* purchaser; and as to McDowell, the right of removal certainly exists by reason of his agreement, and he could not defeat that right even by a revocation of his license. *Barnes* v. *Barnes*, 6 Vt. 388.

This doctrine is highly equitable when, as here, the annexations can be removed and leave the realty as good security as though they had not been made at all. If this

could not be done, the right to remove might not exist as against the mortgagee.

And this is the doctrine of many of the states, though in some of them a mortgage is not a conveyance but a mere security. Thus, in *Campbell* v. *Roddy*, 44 N. J. Eq. 244: 6 Am. St. Rep. 889, 895, it is said to be difficult to perceive any equitable ground on which the property of another that the mortgagor annexes to the mortgaged premises should inure to the benefit of a prior mortgagee; that as long as he is secured the full amount of the indemnity he took, he has no ground of complaint; that it is not inequitable to him, but highly equitable to the owner of the chattel to protect him as far as it will not diminish the original security of the mortgagee; that as between the mortgagor and the mortgagee, the latter is entitled to all annexations that the former makes of his own property, but that he is not entitled to the property of others. *Merchants National Bank* v. *Stanton*, 55 Minn. 211: 43 Am. St. Rep. 491, and *Binkley* v. *Forkner*, 117 Ind. 176: 3 L. R. A. 33, are to the same effect, and well considered. See note to *Muir & McDonald* v. *Jones*, 19 L. R. A. 444, and *German Savings & Loan Soc.* v. *Weber*, 16 Wash. 95: 47 Pac. Rep. 224.

The New York cases usually cited as supporting this doctrine of a broader equity do not sustain it, as in most if not all of them the mortgagees were parties to the agreement; and *McFadden* v. *Allen*, 19 L. R. A. 446: 134 N. Y. 489, is against the doctrine.

Preston v. *Briggs*, 16 Vt. 124, may also be thought to be opposed to it, though there the title had come to the plaintiff through several mesne conveyances after foreclosure and writ of possession executed. The case was this: A mortgagor let his son build a barn on the mortgaged premises after condition broken and pending a suit to foreclose, of which the son had notice. Nearly nine years after the equity of redemption expired, the grantee of the son removed the barn and the plaintiff brought trespass

therefor. The court said that as between the mortgagor and his son it might well be said that the son had a right to remove the barn when he left the premises, and perhaps within a reasonable time thereafter, but that that right was certainly lost by the lapse of the statutory period of limitations, but that the case was not so favorable for the defendant as though his claim was made against one standing in the right of the mortgagor, for the plaintiff stood in the right of the mortgagee, and the barn having been built after condition broken and pending suit to foreclose, the one erecting it did so at his peril; that the record of the mortgage and the pendency of the suit were full notice to him that whatever structures or even fixtures he put upon the land by the permission of the mortgagor would pass to the mortgagee unless the premises were redeemed; that the case stood the same as though the mortgagor himself had built the barn, and that on both grounds the rights of the plaintiff were superior. If this case can be said to favor the oratrix's claim, the answer is that *Davenport* v. *Shants* and the cases that have followed it have engrafted an exception upon the rule there applied, and that this case comes within that exception.

Kendall v. *Tracy*, 64 Vt. 522, is not in conflict with *Davenport* v. *Shants*, for there the defendants built their mill upon a piece of the mortgaged premises that they bought of the mortgagor, so they stood in the shoes of the mortgagor in adding structures, which were intended to be permanent and to enhance the value of the realty.

While they hold in England in cases of this kind that the fixtures cannot be removed without the assent of the mortgagee, yet they find his assent in the mere fact that he allows the mortgagor to remain in possession and deal with the property. *Sanders* v. *Davis*, L. R. 15 Q. B. D. 218; *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415; *Gough* v. *Wood & Co.*, [1894] 1 Q. B. 724. The case at bar is stronger than those

cases for implying the oratrix's assent, for here was not only possession by the mortgagor and dealing with the property, but the oratrix knew of the letting and did not object. Hence I for one do not see why the case might not well be put on the ground of assent by her.

Decree reversed and cause remanded with mandate.

J. E. SAFFORD *vs.* THE GAYSVILLE MANUFACTURING COMPANY and THE BETHEL ELECTRIC LIGHT & POWER COMPANY.

May Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, MUNSON, START and THOMPSON, JJ.

Opinion filed October 12, 1898.

Reservation or Restriction?—A clause in a deed, although there named a reservation, must be given its natural force, even if it operate as a restriction upon the rights of the grantor.

Reservation or Restriction?—There were three equal water-rights upon White River at Gaysville, one upon the west side, called the Gay right, the other two upon the east side, called respectively the mill right and the factory right. In 1889 the mill right and the factory right were both owned by the Manufacturing Co., which then sold to Adams the mill, yard and machinery, "and the right of drawing two-ninths of the water of said river when and so long as the water of said river runs over the dam;" but provided that the grantee, his heirs and assigns, were "not to draw any water from the pond, except when it is running over the dam;" although if the grantor or its assigns should not want to use the water, the grantee, his heirs and assigns, "may take, draw and use such water," subject to the Gay right, "until the grantor or its assigns shall want to use the same." Then the grantor reserved "all its rights of taking, drawing and using the water in said dam in the way and manner it has been accustomed to take and use the same, except that the grantee, his heirs and assigns, shall have the right to draw water as aforesaid." In view of the situation, history and circumstances, which are too voluminous to be brought within the proper limits of a head-note, it was *held*, that the so-called reservation operated to restrict the grantor's right in the use of the water to the

length of time, identity of hours and quantity used, that it had been accustomed to run and use, but not to the identical hydraulic conditions, if these could be changed without detriment to the grantee.

Costs.—Both parties appealed; but the defendants having secured a reversal are allowed their costs in this court.

CHANCERY. Heard on pleadings, master's report, exceptions thereto and motion to recommit, Windsor county, before *Tyler*, Chancellor, who on February 14, 1898, rendered a decree perpetually enjoining the defendants from altering the bulkhead or flume under the sawmill and grist-mill, or the rock raceway, and from taking water in any other way than that in which said Manufacturing Co. has been accustomed to take it, and from drawing from the pond earlier than six o'clock in the morning or later than half-past six o'clock in the afternoon. Both parties appealed.

William E. Johnson for the orator.

Hunton & Stickney, for the defendant, cited on the question of construction, *Rood* v. *Johnson*, 26 Vt. 64; *Rogers* v. *Bancroft*, 26 Vt. 257; *Adams* v. *Warner*, 23 Vt. 410; Gould on Waters, § 318, note 4.

ROWELL, J. There has been a water-power in Gaysville ever since 1825 formed by a dam across White River. In 1845 this power was divided into thirds, namely, the Gay right on the west side of the river, the grist-mill and sawmill right on the east side of the river, and the factory right on the same side, below the grist-mill and sawmill right. From 1845 to 1856 these rights were owned separately; but in 1856, Thomas Greenbank, the then owner of the factory right, bought the mill right, and thereafter continued to own and use both rights till 1873, when he sold and conveyed them to Tupper, Gay, Brooks and Baxter, and in 1888 they sold and conveyed them to The Gaysville Manufacturing Company, a corporation by voluntary association. At this time there was a large woolen factory on the factory right, built by Greenbank, and the

Manufacturing Co. ran it till October, 1888, when it was burned and has not been rebuilt.

In April, 1889, the Manufacturing Co. sold and conveyed the sawmill and grist-mill and millyard to John Q. Adams, together with all the machinery used in connection therewith, "and the right of drawing two-ninths of the water of said river when and so long as the water of said river runs over the dam;" but the grantee, his heirs and assigns, were "not to draw any water from the pond, except when it is running over the dam;" but if the grantor or its assigns should not want to use the water, then and in that case the grantee, his heirs and assigns, "may take, draw, and use such water," subject to the Gay right, "until the grantor or its assigns shall want to use the same." The deed was conditioned that the grantee, his heirs and assigns, should bear two-ninths of the expense of building and maintaining the dam, and the whole expense of keeping the flume under the mills in repair, except at such times as the grantor or its assigns should use and occupy its share of the water-power, when the grantor should bear two-thirds of that expense. The grantor reserved "all its rights of taking, drawing, and using the water in said dam in the way and manner it has been accustomed to take and use the same, except that the grantee, his heirs and assigns, shall have the right to draw water as aforesaid."

Adams owned and operated his mills till October, 1891, when he sold and conveyed to the orator all that he acquired of the Manufacturing Co.

The Bethel Electric Light & Power Company was incorporated July 30, 1895, and soon bought of the Manufacturing Co. all and singular its remaining water rights and privileges, including the factory site, whereon it has built an electric plant, and is furnishing lights to the village and people of Bethel, taking water from said dam for its power.

The only question submitted is, what water rights were

conveyed by the deed from the Manufacturing Co. to Adams?

From 1856 to the time the factory was burned in 1888, most of the water used on the east side of the river was by the factory, which did the principal part of the business during that time, the mills doing comparatively little business; and when the water was scarce, so that it was inconvenient for the factory to have the mills running, the gates of the latter were shut down, the factory being the principal interest. For two or three years before Adams bought, the mill building was used by the Manufacturing Co. for storage purposes.

While Greenbank owned the factory, there were two water-wheels in the grist-mill and sawmill. The water was taken from the pond through an opening in a bulkhead at the east end of the dam into a forebay that extended across the south end of the sawmill, and from this forebay the water was taken to the factory wheel in an open plank sluice running under the mill to a rock raceway extending under a highway at the north end of the mill. This raceway is covered with earth and stone, and the bottom is three feet and nine inches lower than the top of the dam, and three feet higher than the bottom of the head-gate through which the water flows from the forebay to the flume under the orator's mill. It remains as originally constructed more than fifty years ago, and the top of it is so much higher than the top of the dam that it never fills except in extremely high water. The only way that water was ever taken to the factory is through this raceway, from the north end of which, water ran to the factory wheel in an open plank flume. The water was taken to the two wheels under the grist-mill and sawmill in separate spouts or sluices running from the bottom of the forebay to the wheels, whereby full head was given.

In 1879, after Greenbank sold out, the factory wheel not giving the desired power, substantial changes were made in

the manner of taking water to the wheels under the sawmill and grist-mill and the factory. The plank sluices under the mills were taken out, and the entire space between the forebay and the rock raceway, thirty feet wide and seventy feet long, was used as a flume, the overflow of which runs into the river over the sill of the mill, which is on a level with the top of the dam. From this flume the water runs through the rock raceway, and was taken thence in a circular penstock to the factory wheel, which was a four-foot, sixty-horse-power Hathaway wheel, substituted in place of the wheel used by Greenbank. No wheel of greater power than this, nor that took more water, was ever in the factory, and this was sold to Adams after the factory was burned, and he put it into his mill in place of one of his wheels. The plant was much out of repair when he bought it, and he at once commenced to repair it, and expended about a thousand dollars therein and in putting in new machinery. Amongst other things he repaired the dam and put a new gate into the forebay that admitted more water than the old gate did, and the other owners contributed to this last-mentioned expense. He bought the property to use as a saw and grist-mill to be operated by water, and would not have bought it but for the water-power, and the mill buildings were at that time of no value to him aside from the water-power. The Manufacturing Co. understood Adams's purpose in buying, and sold the property to him to be used as a saw and grist-mill to be operated by water, and it did not at that time contemplate the use of its own power for electrical purposes.

The orator, after his purchase, laid out about $1,500 on the property, and ran the mills till they burned in February, 1895, after which he rebuilt at an expense of about $13,000.

Usually both the Gay factory and the Greenbank factory ran from 6:30 A. M. to 6:30 P. M.; and occasionally a part of the machinery was run after 6.30 P. M. to not later than

10 P. M., for the purpose of evening up some part of the work that had got behind other parts.

When the water was running over the dam, there was no difficulty in running the wheels in the mills and factories on all the rights with sufficient power to operate the machinery. The river does not furnish a constant supply of water. It varies greatly at different seasons, and at different times in the same season, and at times of low water the quantity is very limited. At times every year there is not enough to furnish the power required for the orator's wheels and the Gay right.

The Electric Co.'s plant was put in to furnish both light and power, and to run day and night, and it intends to run it so, though as yet it has run it only for lights. If it runs day and night, the master finds that the orator could never have any use of the water without cutting off the supply of the Company's wheel, which is of much greater power than the Hathaway wheel that was in the factory when it was burned, and draws much more water. The orator has also changed his wheels and put in a third, and can draw much more water than Adams could when he bought.

The Electric Co. claims the right to lower the rock raceway so it can draw water from the bottom of the pond. The master finds that if it does, the head would be increased and also the flow of water through the raceway, and that the Company's wheel would so exhaust the water every night that there would not be enough to fill the pond so as to run over the dam before the Company would begin to use water the next night, and that thus the orator would, in a dry time, have no opportunity to use the water, as it would never be high enough to run over the dam. As the raceway now is and the Company's works now are, it cannot draw the water more than a foot below the top of the dam.

As to the construction of the deed in question, the orator claims that thereby the grantor undertook to convey all the

water in the river, except the Gay right, when it did not want to use any, and two-ninths of the water in the river when it runs over the dam, the grantor using the water as it had been accustomed to use it; that the Electric Co. can use it as the Manufacturing Co. was accustomed to use it, and that whenever, with that use, there is sufficient water to run over the dam, the orator has a right to use two-ninths of the water of the river.

The defendants claim, on the other hand, that whether the language of the deed is considered alone or in connection with the facts and circumstances touching the use of the water and the situation and condition of the parties, but one conclusion can be drawn as to what was intended to be conveyed, and that is, two-ninths of the water of the river when it runs over the dam, the grantor reserving to itself all its rights in the real estate conveyed that were necessary to an efficient use of the water rights it did not grant away; that it intended to retain all that was excepted from the grant and all that it owned besides, and intended to be a tenant in common with the grantee when the water runs over the dam; that it is the exclusive owner of two-thirds of the water in the pond when the water does not run over the dam, and did not intend its grantee should be a tenant in common with it at all times, but intended to convey a lesser right, and one subordinate to its own; that the conveyance of the sawmill and grist-mill conveyed the flume under them, which the grantor had been accustomed to use; and not wishing nor intending to be restricted in that use as long as it was advantageous to continue it, it reserved that right by the reservation clause, which was intended to operate as an exception from the conveyance and not to effect what was not conveyed.

We are inclined to the orator's view, largely. The deed conveys the absolute right to draw two-ninths of the water of the river when, and only when, the water runs over the dam, and expressly negatives all right to draw any water

from the pond when the water does not run over the dam, except that it gives the grantee, his heirs and assigns, unrestricted authority to draw water, subject to the Gay right, whether it runs over the dam or not, when the grantor or its assigns do not wish to draw it. As to the reservation clause, it makes but little difference whether it is strictly such or not, for its language must be given its proper force and meaning, whatever it is. It reserves "all the grantor's rights of taking, drawing, and using the water in said dam in the way and manner it has been accustomed to take and use the same, except that the grantee, his heirs and assigns, shall have the right to draw the water as aforesaid." This clearly restricts the grantor in its use of the water to the way and manner it had been accustomed to use it. This construction accords with the intention of the parties, for Adams bought the property for the purpose of using it as a saw and grist-mill to be operated by water power, and would not have bought it but for that power, and the mill buildings were then of no value to him without the power; and the Manufacturing Co. understood his purpose in buying, and sold the property to him to be used and operated accordingly. But the other construction would practically defeat their intention, for thereby Adams's right to water would be entirely dependent on the will of the grantor, which would be at liberty so to use and exhaust the water that he could have none, except in high water, without cutting off the grantor's supply; and this the master finds would be the result if the Electric Co. should run day and night as it intends to do. In view of the language and the subject-matter of the deed and the accompanying circumstances, we think such a construction of the deed would be unwarrantable.

As to the scope of said restriction, we think that when there is not water enough for both parties, the Gay right being respected, it confines the Electric Co. in the use of water to the length of time, identity of hours, and quantity

used, that the Manufacturing Co. was accustomed to run and use, as shown by the report; but we think it does not extend to the hydraulic conditions existing at the time said deed was given, so as to make them unchangeable, but if any change can be made in those conditions that will be beneficial to the Electric Co. and not detrimental to the orator, the Company is at liberty to make them. The parties do not agree whether such changes can be made; but concerning that, let further inquiry be had if desired.

Let the question of costs below be there determined; but let the defendants recover costs in this court, for although both parties appealed, the defendants have secured a reversal.

Decree reversed and cause remanded, with mandate.

J. H. WARREN *vs.* MURRAY BUCK.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed December 5, 1898.

Caveat Emptor.—The defendant, a farmer, sold the plaintiff, a butcher, seven hogs, on inspection, at the full market price per pound live weight, knowing that they were to be killed and cut up for sale in the usual course of the plaintiff's business, as was afterwards done. Two of the hogs had tuberculosis, a latent defect which rendered them unfit for food and dangerous to the health of the consumer. *Held*, that the rule *caveat emptor*, applied, and that the defendant was not liable.

ASSUMPSIT. Trial by court at the December term, 1897, Lamoille county, *Munson*, J., presiding. Judgment for the defendant. The plaintiff excepted.

The defendant, a farmer, sold the plaintiff, a butcher,

seven hogs, on inspection, at the full market price per pound live weight, knowing that they were to be killed and cut up for sale in the usual course of the plaintiff's business, as was afterwards done. Two of the hogs had tuberculosis, a latent defect which rendered them unfit for food and dangerous to the health of the consumer.

G. M. Powers for the plaintiff.

R. W. Hulburd for the defendant.

TYLER, J. The general rule of the common law is, as stated in *Bryant* v. *Pember*, 45 Vt. 487, that upon the sale of goods and chattels, if there is no express warranty of their quality and no fraud, the maxim *caveat emptor* applies, and no warranty is implied by law; and the exception in respect to provisions does not extend beyond the case of a dealer who sells them directly to the consumer for domestic use. Benj. on Sales, ed. of 1888, 639; 2 Kent's Com., 13th ed., 478, notes.

In *Bragg* v. *Morrill*, 49 Vt. at page 47, the court, referring to this subject, said: "Generally, in all sales of provisions, there is a like implied warranty that they are wholesome. 1 Pars. on Cont. 470, and notes. But this doctrine has exceptions, and is held applicable only when the vendor is the producer, or when he exposes them for sale for domestic use as a provision dealer." American and English cases are cited in support of the rule. By the term, "producer," the court evidently had reference to articles manufactured by the vendor. The term may also be applied to certain products of the farm, as was held in *Beals* v. *Olmstead*, 24 Vt. 114, where the plaintiff bought a quantity of hay of the defendant for a particular use, and the defendant knew that the plaintiff would not buy an inferior article for that use; *held* that a warranty was implied. But in that case the defendant professed and was supposed to have knowledge in respect to the quality of the commodity sold.

In *Pease* v. *Sabin*, 38 Vt. 432, the contract was for the

sale of a quantity of cheese manufactured by the seller, and which the purchaser had no opportunity to inspect, and which the seller knew was bought for a foreign market. There a warranty was implied against the latent defect, afterwards discovered, upon the ground that the defect arose from the defendant's want of care and skill in the manufacture of the cheese.

The case of *Best* v. *Flint & Newton*, 58 Vt. 543, is distinguishable from the present one. There both the plaintiff and the defendants were engaged in the business of buying hogs for market, and the defendants engaged the plaintiff to furnish nine hogs to fill their car for shipment, they to pay the highest ruling price for prime marketable hogs. The plaintiff knew the quality required, and that the defendants were paying the price for that quality, and that the defendants relied upon his judgment to select and furnish hogs of the required quality. It was not a sale of hogs which the plaintiff had on hand, but of hogs to be selected and supplied by him without inspection by the defendants. It was held that there was an implied warranty that the hogs were suitable for the use intended. The contract was executory, and there was an undertaking by the plaintiff to furnish hogs of a certain quality. In the present case there was a sale of specific chattels, and there was no undertaking by the plaintiff that they were of any particular quality, and the defect was not discoverable on inspection.

In *Maynard* v. *Maynard*, 49 Vt. 297, the defendant did not disclose the fact of which he had knowledge, that the animal sold by him to the plaintiff was worthless for the purpose for which the plaintiff informed him he wanted it; *held*, that the concealment of the fact was fraudulent, though the defendant made no affirmative representations, nor was he inquired of whether the animal was suitable.

Wing v. *Chapman*, 49 Vt. 33, was an action on the case for the false warranty of a yoke of oxen. After discussing

the subject of the express warranty the court said: "Even without any express warranty, in this class of contracts, the law has now become pretty well settled, that where the special purpose of the buyer is made known to the seller, and the seller, with such knowledge, delivers the goods, the law implies that they are reasonably fit for the purpose specified. If the facts show that the buyer trusts to the judgment of the seller, the seller must see to it that he judges correctly. The question has been much discussed whether this doctrine applied in cases where the seller was not the manufacturer of the goods sold; but it is now settled that it applies generally in all sales of property for a special purpose, if the sale is made on the judgment and skill of the vendor."

In *Badger* v. *Whitcomb*, 66 Vt. 125, the seller made no representation in respect to the boards sold. The defendants had an opportunity to inspect them, and were requested by the seller to inspect them, and by inspecting them they could have discovered the defect; *held* that there was no implied warranty.

In *Howard* v. *Emerson*, 110 Mass. 320, the instruction of the trial court that, "if the plaintiff knew that the defendants wanted to purchase the cow for the purpose of immediately cutting it up into beef, for immediate domestic use, there would be an implied warranty that the cow was fit for that purpose," was held erroneous and the common law rule was adhered to. The same doctrine was held in *Giroux* v. *Steadman*, 145 Mass. 439. The cases that are exceptions to this rule will generally be found to contain the element of deceit, as in *Divine* v. *McCormick*, 50 Barbour 116; in *Wing* v. *Chapman*, 49 Vt. 33; and in *Maynard* v. *Maynard*, 49 Vt. 297. In England, vendors of food are only liable for defects of which they had or might have had knowledge. See cases in notes to Kent's Com., *supra*.

Judgment affirmed.

WINIFRED BROTHERS' ADMINISTRATOR *vs.* THE RUTLAND RAILROAD COMPANY.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, MUNSON and TYLER, JJ.

Opinion filed December 20, 1898.

"And" Read "by."—Upon demurrer to a declaration for negligence, a clause connected with the general allegation of negligence by the word *and*, may be treated as a specification of the negligent conduct, rather than as an independent averment, thus making the whole one allegation, as if the word *and* should be read *by*.

Allege Facts not Law.—It is not necessary that the declaration should allege the legal duty otherwise than by alleging facts from which the court must infer the duty.

Contributory Negligence Matter of Defense.—The plaintiff in an action for negligence is not bound to prove as a distinct affirmative proposition that he was not guilty of contributory negligence, and therefore need not allege the facts that constituted due care and caution on his part.

Statute of Limitations.—It was not necessary to allege in the declaration that the action was brought within the two years prescribed by the statute. It is sufficient, *prima facie*, if it appears by the writ that the action was commenced within that time.

CASE. Heard upon special demurrer to the declaration at the September term, 1898, Rutland county, *Thompson*, J., presiding. Demurrer overruled and declaration adjudged sufficient. The defendant excepted.

Button & Button for the defendant.

Butler & Moloney for the plaintiff.

TYLER, J. This action is brought to recover damages for the death of the plaintiff's intestate, caused by the defendant's alleged negligence in running its train, and comes here upon demurrer to the declaration.

The first point raised is, that the first count in the declaration does not specify the negligent acts,—that conclusions only are stated.

By familiar rules of pleading the count must allege facts from which the court can see that the defendant owed the intestate a legal duty. It is not sufficient to allege that there was a shortage of duty, that the defendant's negligence caused the injury resulting in the intestate's death, but the negligent acts must be set out in traversable form.

The allegations in the first count, to which the demurrer is directed, are: "And the defendant then and there managed, ran and operated the said locomotive and the said train of cars in a negligent, careless and unsuitable manner, and then and there placed said locomotive in the rear of said cars," etc., "and then and there proceeded to push and move said train along said track in a negligent, careless and dangerous condition," etc., "and so negligently . . . moved and operated the said train, without giving any signal or warning, etc., that the deceased was struck and injured."

It is not contended that the allegations following the words, "unsuitable manner," would not, if properly placed in the count, be sufficiently specific, but it is claimed that the clauses being connected by the words, "and" and "without," the averments following those words are placed in opposition to what precedes them, and therefore are not a recital of facts which constitute negligence; that the averments cannot be treated as referring to and describing the negligent management of the train. We think, however, that those words may reasonably be construed as introducing specifications of the defendant's negligent acts, and may be treated the same as if the words were, "by placing the said locomotive in the rear of said cars, etc., and by pushing and moving said train, etc., without giving any signal or warning." The whole should be treated as one allegation—that the defendant placed the locomotive in the rear of the cars and then moved the train along the track without giving any signal.

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It is further urged against the first count that it does not allege a legal duty. This is not necessary. If the facts alleged show to the court that the defendant owed a duty to the intestate, it is sufficient.

The plaintiff was not bound to prove as a distinct affirmative proposition that the intestate was not guilty of negligence. As was said by the court in *Barber* v. *Essex*, 27 Vt. 69, it is a negative rather than an affirmative proposition. The burden is upon the plaintiff to show that the defendant's negligence was the sole operative cause of the injury, which is equivalent to saying that no want of due care on the part of the intestate helped to cause the accident. This was so held in *Bovee* v. *Danville*, 53 Vt. 183. It follows, therefore, that it was not necessary to allege the facts that constituted "due care and caution" on the part of the deceased.

It was not necessary to allege in the declaration that the action was brought within the two years prescribed by the statute. It is sufficient, *prima facie*, if it appears by the writ that the action was commenced within that time.

The objections to the second count are not maintainable. In that, as in the first, the facts are stated "with such precision, certainty and clearness, that the defendant, knowing what he is called upon to answer, may . . plead a direct and unequivocal plea."

Judgment affirmed and cause remanded.

E. COREY & CO. *vs.* OSCAR F. MORRILL, et al.

October Term, 1898.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed December 9, 1898.

Fraudulent Conveyance; V. S. 1848.—The defendant, to hinder a class of creditors to which the orators belonged, conveyed to his mother, without her knowledge and without consideration, certain real estate which she afterwards, in consideration of her indebtedness to him, conveyed to his wife. The orators, having levied upon the real estate, brought this bill to set aside the first conveyance, under V. S. 1848. *Held*, that the case was clearly within the statute.

V. S. 1816; Set Off Unnecessary.—It was unnecessary, under V. S. 1816, that a set off should have been made before equity could interfere. It was only necessary that the orators should have levied upon the land, and that a part of it should have been conveyed away in fraud of their rights.

Fraudulent Conveyance.—In suits to set aside fraudulent conveyances, it is only when there is a valuable consideration for the conveyance that fraud on the part of the grantee is essential.

Fraud in Law.—It is immaterial that the defendant, at the time of the conveyance, was ignorant of his indebtedness to the orators, since he made the conveyance to hinder a class of creditors to which the orators belonged and might easily have ascertained that the orators were among them. It was fraud in law if not in fact.

Statute of Limitations.—If the wife, as defendant, could in any case invoke the statute of limitations in aid of the fraudulent deed to her and the one to her grantor, the facts here do not warrant it, as this proceeding was begun some ten years, only, after the conveyance.

Fraudulent Gift.—The conveyance by the mother to the defendant wife, in consideration of the mother's debt to the defendant, cannot stand as a gift from the defendant to the wife, for it was a gift which he had no right to make.

Record, How Far Conclusive.—A record is conclusive as to all persons to prove the fact that such a judgment was rendered.

Impeachment of Judgment.—The defendant wife was neither party nor privy to the orators' judgment against the husband, and was therefore at liberty to impeach it by showing any fact that was material; but she was not entitled to show that her husband "never did contract the debt," for that judgment was not rendered upon the ground that he

contracted a debt, but upon the basis of an estoppel, such that the law made the promise for him.

Statute against Fraudulent Conveyances.—The statute against fraudulent conveyances made to avoid a right, debt or duty, was not designed to protect, alone, creditors in the strict sense of the term, and the words, "right" and "duty," embrace something more than is covered by the word, "debt."

"*Right, Debt or Duty.*"—The defendant husband's liability upon the judgment at law, as disclosed by the reported case, 61 Vt. 598, was a "right, debt or duty," within those terms as used in the statute against fraudulent conveyances, V. S. 4965.

CHANCERY. Upon master's report and exceptions thereto by both parties at the September term, 1897, Washington county, *Tyler*, Chancellor, rendered a *pro-forma* decree overruling the orators' exceptions and dismissing the bill with costs. The orators appealed.

The facts relating to the liability of the defendant Oscar to the orators were found to be as appears in the reported case, *Corey* v. *Morrill*, 61 Vt. 598.

This bill was brought under Acts of 1888, No. 68, § 1 of which reads as follows: "When an execution has been levied upon real estate as provided in the Revised Laws, §§ 1567 and 1568, and any part of the real estate so designated has been conveyed away or encumbered in fraud of the levying creditor's rights, he may maintain a suit in the court of chancery for the satisfaction of his execution out of the real estate so conveyed, by a sale thereof or otherwise, under the order of said court," etc.

The bill alleged that in 1878 the Cabot Carriage Co. was a partially organized corporation doing business at Cabot, Vermont, and that the defendant, Oscar F. Morrill, was a director therein; that said corporation, without complying with the provisions of Revised Laws 3278, contracted debts and among others one to the orators, for which said defendant became liable as a director under Revised Laws 3279, and also by reason of untrue representations which he made to the orators concerning the status of said corporation, in reliance upon which they acted; that the

debt was all incurred before August 19, 1878, the date of the impeached conveyances; that on July 4, 1884, the orators commenced an action at law against said defendant and others in the county court for Washington county, attaching two pieces of real estate in said Cabot as the property of said Oscar F. Morrill, and all his interest and equity therein, describing the same particularly, and that such proceedings were had in that action that judgment was rendered for the orators in the supreme court for said county at its May term, 1888, by a mandate issued on the 16th day of November, 1888, for their debt and costs; and that on the 8th day of February, 1889, they took out execution, and on the 25th day of March, 1889, caused it to be levied upon said two pieces of real estate by officer's copy in the town clerk's office, as required by R. L. 1567; that said defendant was largely the owner of said real estate at the date of the impeached conveyances, and setting out his interest particularly; that he was heavily insolvent when he made the conveyances and made them for the purpose of putting his property beyond the reach of creditors and of defrauding the orators of their said debt; that the conveyance of the home farm, one of said pieces, was made to said defendant's mother without consideration and with the understanding that she should thereafter, on request, convey it to the defendant's wife, which was accordingly done, October 26, 1882; that the mother and the wife had notice of the fraud; that the mother has deceased. The prayer was that the conveyance be set aside and the real estate, or the defendant husband's interest therein, sold in satisfaction of the orators' execution, and for general relief. The answer denied all the allegations of the bill except that the proceedings in the action at law took place, and that the conveyances were executed, as alleged; and averred that the conveyances were made upon good and valuable consideration and without fraudulent intent.

W. P. Stafford for the orators.

J. P. Lamson and *George W. Wing* for the defendants.

TAFT, J. It appears from the report of the master that on the 19th day of August, 1878, the defendant, Oscar Morrill, conveyed to his mother, Margaret Morrill, his interest in certain real estate, without consideration and unknown to said Margaret.

The bill in this case seeks to have this conveyance set aside as fraudulent. It was made by the said Oscar for the purpose of preventing such of his creditors as had claims against him by reason of his connection with the Cabot Carriage Company from securing their claims by attaching his property, and to protect himself and his family from the financial ruin impending by reason of the failure of the Company. The orators in this suit had a claim against the Company for which the defendant Oscar, as one of the Company, was liable, and after their claim was established in court, by judgment, they brought suit against him, in July, 1884, and levied their execution, which was obtained in February, 1889, upon the real estate in question. The execution was properly levied under V. S. 1816.

The master finds that on the 26th of October, 1882, Margaret Morrill conveyed her interest in said premises to the defendant Clara, wife of Oscar. The consideration for this deed, as stated in the report, was the indebtedness or obligation of Margaret Morrill to the defendant Oscar for her care and support. It is apparent from the facts stated, and the master was justified in finding, that this obligation of Margaret Morrill was to the defendant Oscar. In 1867, when the farm was conveyed by Abel and Margaret, it was conveyed to Oscar, not to him and his wife, and it was agreed then that Margaret was to live upon the farm and the defendants were to be paid for their care and support. Oscar always carried on the farm. The care and support was always furnished by him, although Clara testified that

when the farm was deeded to her the understanding was that the consideration of the deed was her care and support, and the keeping of a home for Hector, a son of Margaret, if he should ever return. The master was justified in finding that the care and support of Margaret was furnished by Oscar, and the indebtedness of Margaret therefor was legally his property. So that we have in this case a conveyance of real estate made to one party when the consideration for the conveyance was paid by another,—in fact, a resulting trust. *Barron* v. *Barron*, 24 Vt. 375; *Clark* v. *Clark*, 43 Vt. 685. Such trust may be proved by parol. *Pinney* v. *Fellows*, 15 Vt. 525; *Clark* v. *Clark*, *supra*. We are aware that when a deed is taken to the wife, the husband paying the consideration, the *prima-facie* implication is that it was intended as a gift, but this implication may be rebutted by testimony so as to create a resulting trust in favor of the party paying. *Wallace* v. *Bowen*, 28 Vt. 638; *Bent* v. *Bent*, 44 Vt. 555. The facts reported by the master fully rebut the presumption that it was intended as a gift to the wife, that is, such a gift as the husband had a right to make. It was rather an attempt on the part of Oscar to prevent the property being taken by his creditors; and the wife paying no consideration, the deed would be invalid as against the orators; so that even the question of a resulting trust becomes immaterial.

The case is clearly within V. S. 1848, which provides that when an execution has been levied on real estate and any part of the same has been conveyed away in fraud of the levying creditor's rights, the creditor may maintain a suit in chancery for the satisfaction of his execution out of the real estate so conveyed, by a sale thereof, or otherwise, under the order of said court.

The facts which bring the case within the statute clearly appear, *i. e.*, the real estate of the defendant Oscar has been conveyed away in fraud of the rights of his creditors, among whom were the orators, and the latter have levied

their execution on such real estate. They are entitled to relief.

The defendants' counsel argues that the conveyance to Margaret Morrill and the subsequent one to Clara cannot be declared invalid for the reason that the grantees did not have knowledge of the fraudulent intent of the grantors; and cites five Vermont cases. *Edgell* v. *Lowell*, 4 Vt. 405; *Root* v. *Reynolds*, 32 Vt. 139; *Leach* v. *Francis*, 41 Vt. 670, were conveyances made upon adequate considerations, and in each case it was held that the grantee must participate in the fraudulent intent of the grantor, or at least have knowledge thereof. In *Fuller* v. *Sears*, 5 Vt. 527, and also in *McLane* v. *Johnson*, 43 Vt. 48, the grantee had knowledge of the fraudulent intent of the grantor, and the sale was held invalid. He also cites nine cases from reports of Massachusetts, New Hampshire, Iowa, New York and the English common law, upon the same question. The Vermont authorities and the one from Cowper do not aid the defendant and we infer the other cases are of the same character. Whatever reasoning there may be in them we should hardly feel inclined to overrule *Foster* v. *Foster*, 56 Vt. 540; *Wilson* v. *Spear*, 68 Vt. 145, and *Fair Haven M. & S. Co.* v. *Owens*, 69 Vt. 247. In *Wilson* v. *Spear*, the law in this jurisdiction is very thoroughly discussed in all its aspects and the many cases in this State upon that subject fully considered and the conclusion arrived at, in the words of *Munson*, J., "It is only when there is a valuable consideration that fraud on the part of the grantee is essential." I, for one, commend these cases to the consideration of counsel. This court ought not to be troubled with such an array of authorities and cases not in point, when the question has been so conclusively settled in the last volumes of our reports.

It is further argued that Oscar was not aware of his indebtedness at the time he made the conveyance to his mother, nor when his mother conveyed to his wife. The

master finds he did not know of the orators' claim until afterwards. He knew there were creditors with claims against the Company for which he was liable, and he conveyed his property away, without consideration, to prevent such creditors from securing their claims by attaching such property. He was aware of the indebtedness of the Company and he undoubtedly could have ascertained the existence of the orators' debt by inquiry, and his conveyance was made for the express purpose of defeating the claims of the creditors whoever they were; and it is apparent that he had the intent to hinder and delay them. This conveyance being without consideration, his want of knowledge became immaterial. It was fraudulent in law if not in fact.

It is also argued that it is necessary there must be an execution levied and a set off made before equity can interfere. Under V. S. 1816 this is not required. The only question under the section referred to is simply, Has the creditor levied upon the real estate and has any part of it been conveyed away in fraud of his rights? By establishing such facts, the creditor may maintain a suit in chancery for the satisfaction of his execution out of the real estate so conveyed. Before a decree can be passed in regard to it, it will be necessary to determine the rights the debtor has in the property to be levied upon and sold, and there is no better forum in which to determine these questions, which at times may be very complicated, than a court of equity.

If the defendant Clara could invoke the statute of limitations in any case in aid of the fraudulent deed to her and the one to her grantor, the facts in this case do not warrant its application. This proceeding was brought at the September term, 1889, in substance ten years after the time of the conveyance to Margaret Morrill in August, 1879.

The questions argued under points eight and nine of the brief for defendants are waived by the orators and are not considered.

The record of the judgment in the orators' favor against Oscar was admitted under exception. It was material to show a claim of the orators against Oscar. A record is conclusive as to all persons to prove the fact that such a judgment was rendered. *Knapp* v. *Marlboro*, 31 Vt. 674.

After the judgment record was in evidence the defendant Clara offered to show that Oscar never contracted and never did owe the debt for which the judgment was rendered. This offer was denied. A judgment cannot be collaterally impeached by a party nor privy. Citation on this point is needless. But Clara was neither, and, if the fact became material, was privileged to impeach it. *Nason* v. *Blaisdell*, 12 Vt. 165; *Atkinson* v. *Allen*, *ibid* 619; *Ingalls* v. *Brooks*, 29 Vt. 398; *Knapp* v. *Marlboro*, *supra*; *Gerrish* v. *Bragg*, 55 Vt. 329. The offer of Clara must be taken in connection with the case as it then stood before the master. This is shown by the opinion in the case in which the judgment was rendered, as reported in 61 Vt. 598. Morrill was liable not by virtue of any express contract entered into by him personally, nor by virtue of any express promise he had made, but judgment passed against him upon a promise the law made for him. He was liable notwithstanding the facts offered to be shown, and they therefore became immaterial. The offer was not to show that the judgment was fraudulent, nor binding upon the defendant therein, nor that it was founded upon the "baseless fabric of a vision," but that he did not contract the debt or claim recovered by it. That this is the correct view to take of the offered testimony is evident from the argument of the counsel, who contends that the orators' claim is not within the statute against fraudulent conveyances, V. S. 4965. He claims the liability of Oscar to the orators was not a debt *ex contractu* within the meaning of the statute. The claim was in form *ex contractu*, and the law made the defendant liable for the debt by reason of his representations. The statute avoids a fraudulent convey-

ance "made or had to avoid a right, debt or duty," and, as was well said by *Walker*, J., in *Green* v. *Adams*, 59 Vt. 602, "It is not designed to protect creditors alone, in the strict sense of the term. It embraces all persons who have a *right* or debt against the conveyancer, or to whom he owes a *duty*, which he attempts to avoid." In *Beach* v. *Boynton*, 26 Vt. 725, it was held that although the words "right and duty" are limited to such rights and duties as are of the nature of debts existing *ex contractu*, yet, even with that limitation, they are far more extensive in their signification than "debt" in its strict sense. The claim against the defendant Oscar was within the statute, and the testimony for the purpose for which it was offered was immaterial, and was properly excluded.

The decree dismissing the bill will be reversed, and cause remanded to the court of chancery to be proceeded with in that court in accord with this opinion, and as the law requires, by the sale of such interest of the defendant Oscar as he may have in the premises, which may be subject to the levy of an execution, or otherwise, as the court may be advised.

Decree reversed and cause remanded.

STATE *vs.* CHARLES B. HOYT.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 26, 1898.

License Fee, When a Tax.—When a business or an occupation consists in selling goods, the exaction of a license fee for its pursuit is in effect the imposition of a tax upon the goods themselves; and a statute which,

like V. S. c. 198, exacts a license fee from the peddlers of goods, "the manufacture of this State," is unconstitutional as being an unjust discrimination against the products of this State.

License Fee, When a Tax.—That the peddler's license fee enacted by V. S. c. 198 is a tax for revenue purposes, further appears from the disposition made of the receipts thereunder, which for the first forty years of its existence went to the State, and for the last fifty years have gone to the counties on the basis of population.

Unconstitutional Discrimination.—The equality clause of the Fourteenth Amendment to the constitution of the United States, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, applies to a discrimination by the state against its own citizens, as well as to one in their favor.

Classification Must Be Reasonable.—Although the equality clause referred to does not prohibit classification for the purposes of taxation, it does require that the classification should be founded upon some reasonable basis; and such a basis is not found in the fact that the goods are manufactured in different states.

INDICTMENT under V. S. c. 198 for becoming a peddler without a license. At the June term, 1898, Orange county, *Start*, J., presiding, the demurrer to the indictment was overruled, *pro forma*, and the indictment and each count thereof adjudged sufficient. The respondent excepted.

John H. Watson for the respondent.

Hale K. Darling, State's Attorney, for the State.

ROWELL, J. The respondent is indicted for becoming a peddler without a license.

The statute on which the indictment is founded provides, that a person going from town to town or from place to place in a town, carrying to sell, or exposing for sale, goods composed in whole or in part of cotton, linen, woolen or silk, plated or gilded ware, jewelry, patent medicine, or a compound medicine the composition of which is kept secret from the public, watches or clocks, which are the manufacture of this State; and a person who transports such goods, wares or merchandise from town to town, or who comes from without the State into a town within the same, bringing such goods, wares or merchandise, and

in a town to which he transports or brings the same, temporarily exposes said goods, wares or merchandise for sale at auction or otherwise, at a public or a private house, store, or other place—shall be deemed a peddler. And it imposes a fine for becoming a peddler without a license in force; and requires the payment of a license fee, varying in amount from fifteen to sixty dollars, according to how the licensee travels and what he carries. V. S. c. 198.

We construe this statute to refer exclusively to the manufactures of this State. This construction is obvious when compared with it as it was in the Revised Laws. It then expressly included the manufactures of the United States. The language was, "which are the manufacture of the United States," instead of "this State," as now. In other respects it was the same then as now, except it then embraced goods, wares and merchandise that were the growth or manufacture of a foreign country, and excepted from its operation persons selling goods, wares or merchandise that were the manufacture of this State, except plated or gilded ware, jewelry, clocks and watches. But that exception was repealed in 1882, and the inclusion of articles of foreign growth or manufacture was held unconstitutional in *State* v. *Pratt*, 59 Vt. 590, as being a regulation of commerce and an imposition of a duty on imports. For some reason the Vermont Statutes substituted the words, "this State," for the words, "the United States," thus making the act refer exclusively to the manufactures of this State. Why this was done is not obvious. It may have been because it was thought that it would be unconstitutional to embrace the manufactures of other states, although put upon the same footing as the manufactures of this State. If so, it was a mistake, for it would have been entirely constitutional, as shown by *Machine Co.* v. *Gage*, 100 U. S. 676.

It can hardly be supposed that the intention was to discriminate against the manufactures of this State; and

yet that is the effect of the statute, if the license fee is to be regarded as a tax upon the goods authorized to be sold; and that it is to be so regarded cannot be questioned. Indeed we so held in *State* v. *Pratt*, above cited. And this is in accord with the decisions of the supreme court of the United States. Thus in *Brown* v. *Maryland*, 12 Wheat. 425, 444, the question was whether an act of the legislature of Maryland was constitutional that required importers of foreign goods to pay a license tax for selling them in the form and condition in which they were imported. It was contended on the part of the State that the tax was not imposed on the goods, but on the trade and occupation of selling them by wholesale after they were imported, and was laid upon the same principle as the usual taxes upon retailers, innkeepers, hawkers and peddlers, or upon any other trade exercised in the state. But the court said it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance; that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article, which must be paid by the consumer, or by the importer himself the same as a direct tax on the article; and the act was held unconstitutional, as being a duty on imports and a regulation of commerce. So in *Welton* v. *State of Missouri*, 91 U. S. 275, it was held that when a business or an occupation consists in selling goods, the exaction of a license fee for its pursuit is in effect the imposition of a tax upon the goods themselves; and a statute exacting a license fee from dealers in goods not the product nor manufacture of the state, before they could be sold from place to place in the state, was held unconstitutional, as being an unjust discrimination against the products of other states. In that case, as in *Brown* v. *Maryland*, it was sought to maintain the act on the ground that it imposed but an occupation tax. The court admitted the power of the states to impose taxes in the way of licenses upon all

pursuits and occupations within their limits, but said that the power must be exercised in subordination to the requirements of the Federal Constitution. The same doctrine was held in the *License Tax Cases*, 5 Wall. 462.

Judge *Cooley* says that every burden that a state imposes upon its citizens with a view to revenue, either for itself, or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions, is imposed under the power of taxation, whether done under the name of tax, or under some other name; that the license fees that are sometimes required to be paid by those who follow particular employments are, when for the purpose of revenue, taxes. Constitutional Lim. (6th ed.) 611. According to this, the license fee in question is a tax; for that it is imposed for revenue appears from the fact that for the first forty years of the existence of the statute the money received thereunder went to the State, and for the last fifty years and more it has gone to the counties on the basis of population.

Thus it appears that the statute imposes a tax upon the goods themselves when peddled. This being so, we have said that it discriminates against the manufactures of this State, and that is true. To illustrate: A manufactures watches in Vermont, and B manufactures precisely the same kind and grade of watches in New Hampshire. Each peddles his goods in Vermont. A pays a license fee of sixty dollars for each of his peddlers, while B pays no license fee for his. A's goods are discriminated against.

Now the equality clause of the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The respondent invokes this clause, and says that the statute is obnoxious to it by reason of its discrimination.

But it has been held that in respect of taxation, that clause was not intended to compel a state to adopt an iron rule of taxation; nor to prevent the classification of

property for taxation at different rates; nor to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it; that it is enough that there is no discrimination in favor of one as against another of the same class. *Giozza* v. *Tiernan*, 148 U. S. 657. Such discrimination impairs that equal right that all can claim in the enforcement of the law. *Soon Hing* v. *Crowley*, 113 U. S. 703, 709.

The question, therefore, is one of classification. If, in the case supposed, the resident and the non-resident manufacturer or their goods can be differently classed, the statute can be sustained; otherwise, not. The rule on this subject is, that the mere fact of classification is not enough to exempt a statute from the operation of the equality clause of said Amendment, but that in all cases it must appear, not only that a classification has been made, but that it is one based on some reasonable ground, some difference that bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150.

Under this rule it seems impossible to make a classification here, for want of a sufficient ground on which to base it. It cannot be based on any difference in the goods themselves, for they are precisely alike; nor on the fact that they were made in different states, for that bears no just and proper relation to a classification, but is purely arbitrary. It cannot be based on public policy; for it is not reasonable to say that it is for our interest to encourage the introduction and sale of the goods of the non-resident manufacturer, when thereby the manufacture and sale of the goods of the resident manufacturer would be discouraged and perhaps prevented altogether. Nor can it be based on the difference of residence of the manufacturers, for that, as in case of the goods, would be purely arbitrary also; and besides, would allow a state to discriminate against its own citizens in favor of the citizens of other states, which it cannot do, any

more than it can discriminate in favor of its own citizens against the citizens of other states; for the equality clause of said amendment includes everybody. No state shall "deny to any person within its jurisdiction the equal protection of the laws," is its language, and its universality of inclusion has been often adjudged. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. If a classification can be based on none of these grounds, we see no ground on which it can be based.

As illustrative of the practical application of the rule of classification, reference may be had to *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, and *Magoun* v. *The Illinois Trust & Savings Bank*, 170 U. S. 283. In the former case, a statute taxing the receipts of express companies that hired railroad and steamboat companies to transport their merchandise, but not thus taxing railroad and steamboat companies owning their own means of transportation and carrying express matter in connection with their other business, was upheld as constitutional, because of the essential difference between the companies, the express companies not being otherwise taxable, as they had no tangible property, while the railroad and the steamboat companies were otherwise taxable, as they had tangible property. In the latter case, a collateral inheritance tax that classified legacies to strangers to the blood, and increased the rate of taxation as the amount of the legacy passed from one sum to another, was upheld on the ground that the tax was not on money, but on the right to inherit, and therefore a condition of inheritance, and gradeable according to the value of the inheritance; that the condition was not arbitrary because it was determined by that value, and not unequal in operation because it did not levy the same percentage on every dollar, as it treated alike all in like circumstances and conditions, both in the privileges conferred and the liabilities imposed.

In North Carolina it is held that the requirement of uniformity in the state constitution applies to an occupation tax when imposed for revenue.

Judge *Cooley* says that when license taxes, for any reason, become discriminative between individuals of the class taxed, and select some for exceptional burdens, they are deprived of the necessary element of legal equality, and inadmissible; that it is immaterial on what ground the selection is made; whether of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting former taxes for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection is once admitted, limits cannot be set to it, and therefore it may be used for oppression and even punishment.

We are constrained, therefore, to hold the statute unconstitutional in the respect indicated. This makes it unnecessary to consider the other questions in the case.

Judgment reversed, demurrer sustained, indictment adjudged insufficient and quashed, the respondent discharged and let go without day.

W. S. NAY *vs.* THE TOWN OF UNDERHILL.

May Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Health Officer Must Be a Resident.—V. S. c. 193, although not explicit upon that point, does not authorize the state board of health to appoint for a town a health officer who is not a resident of that town; the duties to be performed by such officer as well as the general and long settled understanding that local officers must be selected from

among those for whom they are to act, making it clear that such was the legislative intent.

ASSUMPSIT. Trial by court at the September term, 1897, Chittenden county, *Taft*, J., presiding. *Pro-forma* judgment for the plaintiff. The defendant excepted.

Henry Ballard and *J. J. Monahan* for the defendant.

Cushman & Mower for the plaintiff.

START, J. The action is general assumpsit, to recover for services rendered and expense incurred by the plaintiff while acting as health officer for the defendant town under an appointment from the state board of health. At the time the plaintiff was appointed, and when he rendered the services and incurred the expense sought to be recovered, he was not a resident of the defendant town, but of an adjoining town. The services were not rendered nor the expense incurred at the defendant's request, and no promise on the part of the defendant, or any of its officers, to pay for the services is shown. The services were rendered and the expense incurred by the plaintiff by virtue of his appointment as health officer by the state board of health, and the defendant's liability depends upon whether the legislature has vested the state board of health with power to appoint a health officer for a town, who is not a resident of the town for which he is appointed.

Under V. S. c. 193, it is the duty of the state board of health to appoint a health officer for each town, village and city in the State. The health officer, with the selectmen of the town, trustees or bailiffs of a village, or the aldermen of a city, shall constitute a local board of health. The health officer shall be secretary and executive officer of the local board, and shall hold office for three years, unless he resigns or is sooner removed. He shall, in connection with the other members of the board, make sanitary inspection, abate all nuisances, destroy, prevent or remove all sources of filth or causes of sickness, guard against the introduction

of contagious or infectious diseases, control all persons and things arriving in his town from infected places, require the isolation of all persons and things infected with, or exposed to, contagious or infectious diseases, provide suitable places for the reception of the same, and, if necessary, furnish medical treatment and care for such as are sick, at the expense of the town, require, and, if necessary, provide the means for the thorough purification, disinfection and cleaning of infected places. Notice of infectious or contagious diseases must be given to the health officer, and the town for which he is appointed is required to pay for his services.

For the performance of these duties, the personal presence of the health officer in the town for which he is appointed is necessary; and it would seem that for their convenient and inexpensive performance, he should reside in the town for which he is appointed. He should be accessible and so situated as to be able to act with promptness and dispatch, in order to effectuate the purpose of the enactment creating the office. A resident of the town for which he is appointed would be more likely to secure healthful and sanitary conditions than a resident of a remote town, and at less expense. If the state board of health can appoint a health officer for a town, who is not a resident of the town for which he is appointed, there is no limitation upon its power in this respect, and it can appoint a resident of Newport a health officer for Bennington, and subject the town to a charge, as for ordinary professional services, in favor of the health officer for services for going from Newport to Bennington to quarantine and placard an infected building. Such has not been the construction of the statute respecting appointments and elections to local, municipal or county offices.

We are not aware of any constitutional or statutory provision that requires county offices to be filled by appointment or election from among the residents of the

county, but it has been the universal practice to do so. It has been generally understood that municipal officers must be selected, appointed or elected from among those they are to act for, or over whom they have jurisdiction or control, and that one must be an elector in a precinct in order to be eligible to office therein. Selectmen and other town officers must be chosen from among the inhabitants of the town. V. S. 2980. The selectmen and health officer constitute a local board of health for the town for which they are elected and appointed, and their powers and duties are to be exercised and performed within the corporate limits of the town for which they are elected and appointed. Beyond these limits they have no jurisdiction and have no duties to perform. They are local officers, and the health officer is one of them. The construction that has thus been given to statutes relating to local officers is applicable in this case. We therefore hold that the legislature intended that a health officer should be appointed from among the residents of the town for which he is appointed; that the state board of health had no power to appoint the plaintiff a health officer for the defendant town; and that he acted as such without authority, and is not entitled to recover.

Judgment reversed, and judgment for the defendant to recover its costs.

PETER GERMAN, admr., *vs.* BENNINGTON & RUTLAND RAILROAD COMPANY.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Opinion filed January 26, 1899.

Demurrant's Rights, How Saved.—When a demurrer is overruled in a civil case at law, and the court does not enforce judgment thereon under the rule nor pass the case up before final judgment, the demurrant must elect whether he will abide by his demurrer and let judgment pass against him and then go up, or whether he will plead over and thereby waive it. Whether by leave of court the demurrant's rights may be reserved, is not considered. They are not reserved by the mere fact that the exceptions are ordered to lie.

Exception.—When the exceptions do not show the ground of the defendant's motion for a verdict, the question cannot be considered in this court.

What Revisable.—The action of the county court upon a motion to set aside a verdict as against the evidence, or against the weight of evidence, is not revisable here.

Evidence Conflicting.—The motion to set aside the verdict for want of evidence of negligence on the part of the defendant and for conclusiveness of evidence of contributory negligence on the part of the plaintiff, was properly overruled, for the testimony upon both points was conflicting.

CASE. Plea, the general issue. Trial by jury at the March term, 1898, Rutland county, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

Barber & Darling, *J. K. Batchelder* and *George E. Lawrence* for the defendant.

Butler & Moloney for the plaintiff.

ROWELL, J. This is case for negligence in running over and killing plaintiff's child, twenty-one months old.

By pleading the general issue and going to trial thereon after the demurrer to the declaration was overruled, instead

of standing on the demurrer and submitting to a judgment of *quod recuperet*, the demurrer was waived. This court has repeatedly so held. *Rea* v. *Harrington*, 58 Vt. 181; *Houston* v. *Brush*, 66 Vt. 331; *Grand Isle* v. *Kinney*, 70 Vt. 381. And this is the rule everywhere, unless otherwise by statute. 6 Ency. Pl. & Pr. 363. "Who ever heard," says Chief Justice *Nelson* in *Jones* v. *Thompson*, 6 Hill 621, "of an issue of law upon the record in this court after the party demurring has had leave to amend and has availed himself of the privilege by joining an issue of fact?" What is there called an amendment was simply pleading the general issue after a demurrer to the declaration was overruled. In *Campbell* v. *Wilcox*, 10 Wall. 421, the defendants demurred generally to the declaration. The demurrer was overruled and they pleaded to the merits, and the case was submitted to the court without the intervention of a jury. The court said that pleading to the merits after the demurrer was overruled operated as a waiver of the demurrer; that the demurrer was thereby abandoned, and ceased thenceforth to be a part of the record.

The fact that the exceptions were ordered to lie, makes no difference, as suggested in argument that it does; for although it is quite the practice to order exceptions on interlocutory questions to lie, yet the order has no force nor significance, for they must necessarily lie until they are disposed of in some way, unless the court, in its discretion, passes the case up on them before final judgment.

When a demurrer is overruled in a civil case at law, and the court does not enforce judgment thereon under the rule nor pass the case up before final judgment, the demurrant must elect whether he will abide by his demurrer and let judgment pass against him and then go up, or whether he will plead over and thereby waive it. Whether, by leave of court, any other course is open to him, we have no occasion to inquire.

We have treated this subject somewhat at large, for the purpose of calling the attention of the Bar more fully to the rule, that the practice may be more in accordance with it.

As the exceptions do not show the ground of the defendant's motion for a verdict, the question cannot be considered. We presume, however, that the same question is raised by the motion to set aside the verdict for want of evidence tending to show negligence on the part of the defendant, and for that the undisputed evidence showed contributory negligence on the part of those for whose benefit the suit is brought, which we consider. But as far as the motion is based upon the ground that the verdict was "against the evidence," and "against the weight of evidence," we do not consider it, for the action of the court in that respect was discretionary and not revisable here. *Stearn* v. *Clifford*, 62 Vt. 92.

The defendant excepted to the refusal of the court to charge that the engineer owed no duty to the child by way of precaution in discovering it upon the track until he had reason to apprehend that a child was there. But the question of the engineer's duty in this respect was not involved in the case, for by his undisputed testimony, when he first saw the object that turned out to be the child, he was at such a distance from it that he could easily and without inconvenience have stopped the train before reaching it, and as he knew it was something that did not belong on the track, he kept his "eye centered upon it" from the time he first saw it till he reached it. Hence the question was, not whether the engineer discovered the object as soon as he ought, for no claim was made that he did not, but whether, having discovered it, he exercised the requisite degree of care in discovering that it was a child, and in endeavoring to avoid injury to it after such discovery; and to the charge on this question the defendant did not except.

But it moved to set aside the verdict, for that there was no evidence tending to show negligence on its part. This

motion was properly overruled, for the testimony was conflicting on this point; that on the part of the defendant tending to show that the engineer discovered that the object was a child as soon as he could, and then did everything in his power to stop the train but could not; while that on the part of the plaintiff tended to show that he could have stopped the train seasonably after discovering the child, and that in fact he did slow down after passing the point at which he admitted such discovery, as if to let some one off at the farm crossing in question, and then started up again just as it left the crossing, which was only 275 feet from the child.

The motion for a verdict on the ground that the testimony showed contributory negligence on the part of those for whose benefit the suit is brought was also properly overruled. The testimony was not sufficiently decisive on that question to make it one of law, but, in the circumstances, it was clearly one of fact, as much as it was in *Lindsay, admr.* v. *The Canadian Pacific R. R. Co.*, 68 Vt. 556.

Judgment affirmed.

RE WILLARD FULLER'S ESTATE: ROSCOE S. FULLER, apt., LETTIE J. FULLER, apee.

October Term, 1898.

Present: ROSS, C. J., TAFT, TYLER, MUNSON and START, JJ.

Opinion filed December 21, 1898.

License to Occupy, No Revocation of Devise.—The testator, after the making of the will, made a contract in writing, but unsealed, unwitnessed and unrecorded, whereby he agreed to convey a piece of land included in one of the devises, and was to be paid therefor two hundred dollars in

installments, and to give a deed and take a mortgage back after fifty dollars had been paid. Possession had been taken and twenty-eight dollars of the price paid before the testator's decease. *Held*, that the contract did not operate as a *pro-tanto* revocation of the will, creating the relation of mortgagor and mortgagee and leaving the testator only a chattel interest in the land, but was only a license to occupy, under which the licensor's interest was lost by non payment; and that if his payment created an equity in his favor, it could be asserted only by him, or his privies, not by the executor for the purpose of depriving the devisee of the land.

Devisee Entitled to Rent as against Executor.—A writing signed by a lessor,—but neither sealed, witnessed, acknowledged, nor recorded,—purporting to lease a spring with a right to construct and repair a reservoir and aqueduct for so long a time as the lessee, his heirs and assigns, shall pay the specified rent, amounts only to a license, leaving the title in the licensor so that by his devise of the land his devisee becomes entitled to the rent as against the executor.

APPEAL FROM PROBATE. Trial by court at the March term, 1898, Chittenden county, *Thompson*, J., presiding. Judgment as stated in the opinion. The appellant excepted.

V. A. Bullard and *G. W. Hendee* for the appellant.

W. L. Burnap and *M. A. Bingham* for the appellee.

TYLER, J. Willard Fuller, the testator, made his last will and testament February 1, 1888, and died October 12, 1891. The will was duly probated, the appellant was appointed executor, and accepted the trust. The testator devised to his daughter, the appellee, his farm situated in the town of Essex, during her natural life and at her decease to her children and their legal representatives in fee.

In the year 1887 said Fuller leased to one Reynolds, his heirs and assigns, the right to take water from a certain spring upon the farm, with a right to enter upon the land, construct a reservoir, lay aqueducts, make repairs, etc., for as long a time as Reynolds and his heirs and assigns should pay to Fuller and his heirs and assigns, an annual rental of twelve dollars, the lease to terminate upon default of payment of rent for thirty days after it became due and notice in writing to pay the same. The lease was in writing

and was signed by Fuller, but was neither sealed, witnessed nor acknowledged, as required in the execution of deeds, and it was not recorded in the town clerk's office. Reynolds and his assigns have been in the use of the rights given by the lease since its execution, and no claim is made of default in payment of the rent.

December 1, 1889, Fuller made a contract in writing with one St. Armour to convey to him half an acre of land from the farm, with a house upon it, for which St. Armour was to pay him $200, and interest annually, $5 to be paid on demand, and $4 on the first day of each month in advance, until $50 and interest had been paid, when Fuller was to give him a deed and take a mortgage to secure payment of the remainder. The writing was signed by the parties, but was not witnessed nor acknowledged. St. Armour went into possession of the land, and from time to time made some payments of $4 each, the last one on August 1, 1890. St. Armour died a short time before the testator. After the testator's death, St. Armour's widow continued for a time in possession of the half-acre, and then leased it to another person, who, for a time paid rent to the executor, upon his demand, and, February 22, 1892, Mrs. St. Armour, in consideration of $10 paid to her by the executor, quit-claimed the land to him.

The above are the material facts found by the trial court, upon which finding it affirmed the decree of the probate court which gave the use of the farm, including the spring of water and the half-acre to the appellee during her life.

(1) The appellant contends that this contract operated as a revocation, *pro tanto*, of the will in respect to the half-acre and created between the parties thereto the relation of mortgagor and mortgagee, and that the testator's interest in the land became a mere chattel interest.

The appellee contends that the contract did not create a mortgage debt from St. Armour to the testator, that it was

merely a license to St. Armour to occupy the land, and that by non-payment he lost all the right the contract gave him. This contention is correct. There was not such a conveyance of the land as operated to revoke the will, *pro tanto*. If St. Armour acquired an interest in the land by virtue of the payment of $28, it was a mere equitable interest which he, only, or those claiming under him, could assert. At law, the interest of St. Armour, upon failure of payment, fell back into the testator's estate and passed by his will.

(2) There is no question but that a description of premises in a deed sufficiently broad to include everything within the meaning of the word *land* would include a spring thereon supplied by percolating water. *Clark* v. *Conroe's Estate*, 38 Vt. 469. The court below found that the writing given by the testator to Reynolds was a lease of a right to take water from the spring. No one claiming under Reynolds is asserting a right to the spring. The executor claims that the lease conveyed the title to Reynolds, and that the testator then had only a lien or common law mortgage for the payment of the price, and that the $12 a year was not disposed of by the testator's will, but belonged to his estate. The appellee claims that the lease was not a conveyance of the spring; that the spring remained a part of the farm devised to her, and that she was entitled to the annual rent.

The title to the spring was in the testator at the time of the execution of the will, and the will, when proved and recorded, conveyed the spring, as a part of the farm, to the appellee, unless a conveyance such as the law requires is shown to have been made by the testator to another person. It was indeed held in *Stevens* v. *Dewing*, 2 Vt. 411, that a lease to continue as long as wood grows and water runs conveyed a fee in the use of the land, liable to be defeated by the failure of the lessee to perform his covenants; but it was there held that an instrument to divest the lessee

of such an estate must be executed with a seal as required by the statute. In *Cady* v. *Sanford*, 53 Vt. 632, it was decided that a writing signed by the parties, but not under seal, nor acknowledged, nor witnessed, as required by the statute to convey real estate, did not operate to convey growing timber, but was a license to cut timber during the time named in the contract.

The writing amounted in law to a license to Reynolds and his heirs and assigns to take water from the spring upon payment of an annual rental. It was manifestly the intention of the testator to devise the farm to his daughter subject to this license. If the licensee should at any time fail to pay the stipulated rent there could be no doubt but that the spring would be the absolute property of the devisee.

If the question were whether Reynolds and his heirs and assigns, having performed the condition in the writing by them to be performed, had an equitable right to the enforcement of the contract, the authorities cited by the appellant would be in point. No question arises in respect to the power of the probate court, under V. S. 2493, to license the executor to make a conveyance according to the contract. The case finds that since the year 1887 Reynolds and his assigns have been in the use of the rights given by the lease, and are now taking water from the spring.

If the testator had leased the entire farm, or a tenement thereon, to some person by a revokable contract, there would be no question but that the devisee would have taken the farm subject to the encumbrance with a right to the rent. The present case is not different in principle.

There was no error in the judgment below, and it is affirmed and ordered to be certified to the probate court.

ROMAINE A. SPAFFORD *vs.* THE TOWN OF NORWICH. ROMAINE A. SPAFFORD *vs.* CHARLES A. BROWN, et al.

October Term, 1898.

Present: ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Reward, When is Town Bound by Offer of.—Selectmen cannot bind the town by the offer of a reward for the arrest and conviction of the person guilty of removing a body from its grave in a cemetery in the town, it not appearing that the town's property was injured nor that any statute cast upon the town the burden of prosecuting for such offences.

Selectmen Offering without Authority Do not Bind Themselves.—Neither do the selectmen by making such an offer in the name of the town render themselves personally liable to one who acts upon and fulfills its conditions; for such person is bound to know, as well as they, that they have no such authority.

ASSUMPSIT. Plea, the general issue. Trial by jury at the May term, 1898, Windsor county, *Ross*, C. J., presiding. Verdict ordered and judgment thereon rendered for the defendants. The plaintiff excepted.

W. B. C. Stickney, *W. W. Stickney* and *J. G. Sargent*, for the plaintiff, cited V. S. 3016, 3020, 5007, 5008; *Burton* v. *Norwich*, 34 Vt. 345; *Cabot* v. *Britt*, 36 Vt. 349; *Cobb* v. *Cowdery*, 40 Vt. 25; *Hawk* v. *Marion County*, 48 Ia. 472; *Symmes* v. *Frazier*, 6 Mass. 344; *Freeman* v. *Boston*, 5 Met. 56; *Loring* v. *Boston*, 7 Met. 409; *Crawshaw* v. *Roxbury*, 7 Gray 374; *Janvrin* v. *Exeter*, 48 N. H. 83; Dillon Mun. Corp. § 139; *Bay* v. *Cook*, 22 N. J. 343; *Brown* v. *Bradlee*, 156 Mass. 28.

Wm. Batchelder and *Wm. E. Johnson* for the defendants.

START, J. These cases were heard together. The facts, rulings and exceptions were substantially alike in both cases. The actions are assumpsit for the recovery of one

thousand dollars, alleged to have been offered by Charles A. Brown, A. W. Brigham and C. E. Ensworth, as selectmen of the town of Norwich, for and on behalf of said town, as a reward for the arrest and conviction of the person or persons who removed the body of Joseph S. Murdock from its grave in the New Cemetery at Norwich, and the recovery of the body. It appeared that the selectmen signed a writing, purporting to offer such a reward, and caused printed copies of the same to be posted. The plaintiff offered one of these posters in evidence, and, in connection therewith, offered to show, that the publication of the same came to his knowledge; that, acting upon and influenced thereby, he worked diligently to earn the reward, which he understood was lawfully offered by the defendant town; and that he complied with the terms of the offer, demanded payment, and payment was refused. The court excluded the poster and evidence offered in connection therewith, ordered a verdict for the defendants in both cases, and the plaintiff excepted. The plaintiff contends that, by V. S. 5008, an action for damages is given to towns against persons who injure burial grounds within their respective corporate limits; that the procuring of evidence for the successful prosecution of such an action is within the corporate powers of a town; and that the discretion as to what expense shall be incurred, and what means taken to find and procure the necessary evidence, rests with the selectmen.

It did not appear, nor was there an offer to show, that the town's property had been injured by the removal of the body, or otherwise; that the town had a cause of action against any one therefor; or that the reward was offered for the arrest and conviction of a person or persons for injuring or taking away the town's property. The reward was offered for the arrest and conviction of the person or persons who removed the body, and for its return. The poster that came to the plaintiff's knowledge, and on which

he acted, admits of no other interpretation. It states that, "The town of Norwich will pay one thousand dollars for the arrest and conviction of the person or persons who removed the body of the late Joseph S. Murdock from its grave in the New Cemetery at Norwich, and the recovery of the body." The liability of the town, as shown by the plaintiff's offer, was dependent upon whether it could bind itself to pay a reward for the purpose stated in the poster, and whether the selectmen had authority to offer the reward. It is no part of the duty of towns to take charge of criminal proceedings, nor to aid in the detection or conviction of offenders against the criminal laws of the State, unless such duty is imposed by the statute. That duty rests, primarily, on the State. There is no statute which expressly, or by necessary implication, imposes upon towns any duty in respect to the arrest and conviction of persons who remove or disinter a dead body without authority, nor that makes it the duty of towns to procure the return of bodies thus removed. The purposes for which money belonging to a town may be expended are defined, in a great measure at least, by statute, and the expenditure must be for some legitimate purpose connected with the town government, unless its expenditure for a different purpose is authorized by the statute. The only means a town has for paying a reward for the arrest and conviction of a person charged with the commission of a crime, is by taxation; and the inhabitants of one town, as distinguished from the inhabitants of the state, have no such special interest in such an arrest and conviction as will empower a town, in the absence of a statute authorizing or imposing it, to incur such expense.

V. S. 3083, authorizes towns to vote such sums of money as deemed necessary for the support of the poor, for laying out and repairing highways, for the prosecution and defence of the common rights and interests of the inhabitants, and for other incidental town expenses. This section confers no

authority upon the defendant town to raise money for the enforcement of the criminal laws of the State, in the enforcement of which no duty is imposed upon the defendant town, and in which the inhabitants of every other town in the State have, in contemplation of law, the same interest as the inhabitants of the defendant town; and no power can be implied which does not pertain to matters of a local character, and relate to the prosecution and defense of the common rights and interests of the inhabitants of the town, as distinguished from the individual and the inhabitants of the entire State. As we have seen, the State has not placed the prosecution of persons violating the statute relating to the disinterment of dead bodies, without authority, within the corporate limits of the defendant town, under the control and jurisdiction of the defendant town in its corporate capacity. This duty rests upon the State, and the burden is borne by all the inhabitants of the State; and the State has not imposed any duty upon the defendant town to procure the return of a body that has been removed from its burial ground, without authority. Therefore, it had no power to raise money, by vote or otherwise, to defray the expense of procuring the arrest and conviction of persons violating the statute which prohibits the removal or disinterment of a dead body, without authority, or to pay for the return of a body that has been taken away from the place of its interment; nor could it make an enforceable contract respecting such matters. It could bind itself by contract only in respect to those matters which had been placed under its jurisdiction by statute, or by usage, and in respect to which it could vote and raise money. It could not vote a tax to raise money to prosecute a criminal cause over which, in its corporate capacity, it had no jurisdiction, and in respect to which it owed no duty, nor for the return of a human body that, as a corporation, it was under no duty to procure returned. The inhabitants of the defendant town, in

common with all the inhabitants of the State, might wish to have offenders against the statute punished and the body returned to the place of its interment, but the defendant, in its corporate capacity, had no wish or interest. It had no duty to perform, no rights to defend, no interests to protect, no corporate or pecuniary concern in the subject matter, and could incur no liability respecting the same. In *Sheldon & Cushman* v. *Bennington*, 67 Vt. 580, it is held, that, when a municipal corporation has no interest in the event of a suit, or in the question involved in the case, and the judgment thereon can in no way affect the corporate rights or corporate property, it cannot assume the defense of the suit, or appropriate its money to pay a judgment therein; and warrants or orders for the payment of money based upon such a consideration are void.

The selectmen of the town of Norwich did not incur a personal liability by causing to be posted a notice that the town would pay one thousand dollars for the purposes therein stated. The plaintiff, in performing the service for which he claims to recover, was bound to know whether the town could bind itself by contract to pay for such service, and, inasmuch as it could not, the case does not fall within the rule, that an agent is personally liable when he fails to bind his principal for want of authority.

If the town had directed the selectmen to offer the reward in its name, the plaintiff would have been no better off; he could not have recovered. Therefore, he loses nothing by reason of want of authority in the selectmen to bind their principal. In *Taft* v. *Pittsford*, 28 Vt. 286, is is held that the plaintiff making a contract with a public board of officers, is bound to know how far the powers of such officers are limited, and in what event they cease and their work is stayed, and to understand that his contract with them will be subject to such limitations and restrictions as the general public statutes of the State impose upon the subject matter. The case of *Clay* v. *Wright*, 44 Vt. 538, was an action to

charge a town agent, and the court, in the course of the opinion, said: "It cannot be said in this case that the defendant bound himself by the promise, because he failed thereby to bind his principal, for the plaintiff knew he was the town agent, and was bound to know that he had no legal authority to do so, and would not have been justified in relying upon such an undertaking, or entertaining any expectation that the town was thereby bound."

Huthsing v. *Bousquet*, 2 McCrary 152, was an action to recover a reward offered by the supervisors of a county for the arrest and conviction of thieves who had robbed the treasury of the county, and for the recovery of the money; and the plaintiff sought to charge the supervisors personally, on the ground, that, not binding their principal, they bound themselves. The court, in holding that the supervisors were not liable, said: "The case stands upon this principle. The board of supervisors had no authority by law to make the contract on which the plaintiff relies in this action. The plaintiff was bound to know the law, and we must proceed upon the assumption that he did when he accepted the offer, and performed the services. The offer was *ultra vires*. The plaintiff knew it, it was his own folly to accept such an offer, and the court cannot relieve him."

Judgments affirmed.

THE RUTLAND RAILROAD COMPANY *vs.* GEORGE T. CHAFFEE, et al.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, and THOMPSON, JJ.

Opinion filed January 2, 1899.

Ejectment by Railroad Company.—As this court has formerly held that a land owner cannot maintain ejectment against a railroad company, when he has consented to the entry and the construction of the road, or when he knew of it and for years made no objection nor claim for compensation, so it must now be held that such an owner cannot defend ejectment by the company.

Reversioners' Damages.—A railroad company may maintain ejectment against defendants who at the time of the condemnation proceedings were reversioners following a life estate then in being, although their damages were never appraised, especially when all of them for more than sixteen years after becoming of full age have omitted to make any claim for damages.

Survey when Void for Uncertainty.—Condemnation proceedings are not void for uncertainty by reason of designating the starting point as "in the west line of James Barrett Jr.'s land," when the road had been already surveyed and located and was being occupied, and when the metes and bounds make it clear that the point intended was at the intersection of the Barrett line with the side line of the railroad location.

Monuments Control Courses.—In land surveys, monuments control courses even to the extent of reading west for east, especially when the courses as given would enclose no land, but if followed according to the monuments will enclose the land in controversy.

Bagley v. *Morrill*, 46 Vt. 94, distinguished.

No Abandonment.—The plaintiff's right to a portion of its location was not abandoned nor lost by its giving another company a right of way thereover and permitting the latter to build and use a track thereon; for the sensible construction of the facts is that such possession was the possession of the plaintiff, especially as the plaintiff's intention not to abandon the property is indicated by its requiring its general lessees to "maintain the boundaries of the property," and by the fact that such lessees received rent of the defendants for their occupation of the land in question, although under an agreement that the defendants' rights should not thereby be prejudiced.

Adverse Possession.—One cannot acquire a right by adverse possession as against a railroad company, since V. S. 3745.

Betterments.—Although a declaration for betterments must be filed in the county court in case a judgment becomes final in that court, when the cause passes to the supreme court the better practice is to await the disposition in that court; for until then it cannot be known that the question of betterments is material.

EJECTMENT. Trial by court at the March term, 1898, Rutland county, *Start*, J., presiding. On the facts found judgment was rendered for the plaintiff for the seizin and possession of the premises, and $100 damages and costs. The defendants excepted.

The court found that the road was surveyed and located, and the survey certified and recorded in the proper offices, and that the road was constructed and had been ever since operated, and that commissioners were appointed who appraised and awarded the land damages, although some of the damages, as it is stated in the opinion, were never paid.

T. W. Moloney and *J. C. Baker* for the defendants.

W. W. Stickney and *J. G. Sargent* for the plaintiffs.

TAFT, J. Four objections are made to the action of the county court.

(1) It is claimed that ejectment will not lie to recover an easement, as held in *Judd* v. *Leonard*, 1 D. Chip. 204.

This is no doubt true in regard to an easement pure and simple, like the right to cross another's land, to draw water from one's spring, etc. In such case, the one entitled to exercise the right has no title to the land, nor spring, and no right to exclusive possession of it. He can exercise his easement only, and for any obstruction therein he cannot maintain ejectment. The right of the plaintiff to the land in question is an easement; the only purpose for which it had a right to take it, was for a right of way. *Quimby* v. *Vt. C. R. R. Co.*, 23 Vt. 387. That such an interest cannot be taken on execution against the company is stated by *Redfield*, C. J., in *Hill* v. *Western Vt. R. R. Co.*, 32 Vt. 68. We also recognize the rule that a judgment in ejectment

settles the plaintiff's title to, and right in, the land, and establishes his right of property. *Marvin* v. *Dennison*, 20 Vt. 662; *Hunt* v. *Payne*, 29 Vt. 172. It is not necessary to entitle one to recover in ejectment, that his title should be one in fee simple. It is sufficient if he is seized and possessed of the land for any purpose.

It was provided in the charter of the railroad company that constructed the Rutland road that when it took land by right of eminent domain the land should be appraised by commissioners and when the damages were paid "then said corporation shall be deemed to be seized and possessed of such lands so appraised by said commissioners." Acts 1843, No. 54, § 7. The corporation under the circumstances stated in the findings of fact became invested with the same title that would have accrued to them had the damages been paid. It became invested with the title of the land subject to the equitable lien of the owner for his damages. The plaintiff, therefore, is "seized and possessed" of the land, i. e., "seized and possessed of such an estate in the land as is necessary for its uses, a right of way," as in *Quimby* v. *Vt. C. R. R. Co.*, 23 Vt. 387.

Although the right of the plaintiff company is but an easement and not a fee, it is not precluded from having the sole and exclusive possession of the land, while in the exercise of that easement. The railroad company must from the very nature of its attitude, in order to give security to its passengers and workmen and the enjoyment of the road, have at all times the right to the exclusive occupancy of the lands taken, and to exclude all concurrent occupancy by the former owner for any purpose. *Jackson* v. *R. & B. R. R. Co.*, 25 Vt. 150; *Conn. & Pass. R. R. Co.* v. *Holton*, 32 Vt. 43; *Troy & B. R. R. Co.* v. *Potter*, 42 Vt. 265. The judgment in an action of ejectment is, that the plaintiff recover the seizin and possession of the premises. Such was the judgment rendered below. Ejectment is a proper remedy in the case before us. In no other manner

can a railroad company recover possession of its road if by chance it should be dispossessed.

(2) The defendants contend that if the action of ejectment can be maintained, the plaintiff is not entitled to recover for the Pierpoint tract. The plaintiff company or its predecessor surveyed and located their road including within its location the land in question. Pierpoint derived title from a deed given him by Ambrose L. Brown, who owned one-half of the premises in his own right, with a life estate in the other half. The remainder in the latter half belonged to the heirs of his body, and they by quitclaim deed have conveyed to the defendants' predecessors, provided the deeds conveyed the land in question.

One of the deeds, Defendants' Ex. 2, did convey such rights as the grantors then had in the lands in question.

Ambrose L. Brown conveyed the land in controversy to Robert Pierpoint, from whom it was taken by condemnation proceedings and Pierpoint was paid his appraised damages as the sole owner of the premises. The children of Brown owned the estate in reversion, and when the land was condemned three were of full age and the others became so within ten years thereafter. All lived in the village of Rutland and knew of the location and construction of the road.

Ambrose L. Brown, the natural guardian of the minor children, made the preliminary survey of the railroad and was the company's resident engineer when it was constructed. The life estate of Ambrose terminated 22 September, 1865, and the reversioners were then, if not before, entitled to claim their damages. The damages to the reversionary interests were subject to appraisal at the time the road was located and constructed, under Acts 1846, No. 22, § 3, for there was a life estate to be appraised as well as the reversionary interests. From the time of the condemnation proceedings in 1848 until 1873, a period of more than twenty-five years, and sixteen years after all

were *sui juris*, no claim was made by any one of the reversioners in respect to damages.

In the latter year they quitclaimed their interests to the defendants' predecessors in title, and the latter went into possession, but could gain no rights by adverse use. V. S. 3745. This case is governed by former decisions of this court, in which it has been held that the land-owner cannot maintain ejectment nor trespass when he has consented to the entry upon his land and the construction of the road, or knew of it and made no objection and permitted the road to be used for years without making claim for compensation. *McAuley* v. *R. R. Co.*, 33 Vt. 311; *Knapp* v. *McAuley*, 39 Vt. 275; *Kittell* v. *R. R. Co.*, 56 Vt. 96. The same rule has been applied when consent and knowledge did not appear, and even when the land-owner forbade the entry. *Kendall* v. *M. & C. R. R. Co.*, 55 Vt. 438; *Adams* v. *R. R. Co's*, 57 Vt. 240; *Bridgman* v. *R. R. Co.*, 58 Vt. 198; *Robinson* v. *R. R. Co.*, 59 Vt. 426. A case "on all fours" with this is *Austin* v. *R. & B. R. R. Co.*, 45 Vt. 215. It differs from this case in one respect only. In the Austin case, the moiety and life estate in the other moiety were conveyed to the road by deed. In this case, such interests were taken by condemnation. It was held that the reversioners could not maintain ejectment to be let into joint possession. It logically follows that if they cannot maintain ejectment, the railroad company, which is entitled to exclusive possession, can maintain the action to eject them. What remedy, if any, the reversioners or their grantees have to recover their damages is a question not before us.

(3) The third point is that the description of the land taken from Robert Pierpoint under condemnation proceedings is void for uncertainty. The starting point is in "the west line of James Barrett Jr.'s land." Rather indefinite to be sure, but, "*certum est quod certum reddi protest.*" At the time of condemnation, the railroad had surveyed and located the road and were then in occupancy

of the land, and it is clear from the metes and bounds given that the point of beginning was in the southerly line of the railroad location on the west side of Barrett's land, the intersection of the south line of the railroad with the west line of Barrett's land, a point as certain as one could well be. The principal objection in this respect is that in describing the land the fourth and fifth courses are given as N. 88° 30′ *west*, and N. 82° 30′ *west*, when they should have been given as *east*; but monuments are given such as the Williams house, the east line of Barrett's land, and East Creek. The metes and bounds, if run as given in the deed, would enclose no land whatever, but if run according to the monuments given, enclose the land in controversy. There is ample authority for reading the words *west* as *east*, in *Barnard* v. *Russell*, 19 Vt. 334. When there is a conflict between courses and distances, on the one hand, and monuments which are mentioned in the description of the deed, on the other, the courses and distances must yield to the monuments, but in order to apply this rule the existence and location of the monuments must be given or proved by parol evidence. This is not in conflict with the case of *Bagley* v. *Morrill*, 46 Vt. 94, for in that case no monument that is shown to conflict with the courses and distances, is mentioned in the deed. The description of the land is sufficient. It would be absurd after fifty years' possession by the railroad company to hold that it acquired no title, by reason of such error.

(4) The last point is, that "the facts clearly show an abandonment by the plaintiff of the right of way of the Delaware & Hudson tracks if it ever had any." This is not the correct view to take of the facts. The road was surveyed and located and the company entered into possession. The award states that the company had "entered upon and occupied the lands," and were evidently then occupying them.

Soon after the road was located, the company gave the Delaware & Hudson Canal Co's predecessor a right of way over its location upon the southerly side, and this right of way was exercised upon the track built by the latter company in 1852. The facts found show it did not appear that the plaintiff company ever occupied any part of the location south of the Delaware & Hudson Co's tracks, but it does not appear but that they had a right to do so, if they desired. It would certainly be inconvenient for it to be used by any one except the Delaware & Hudson Co. in connection with their right of way, although it might be. The facts show that the defendants erected a dock or platform with side tracks for conveniences in transacting business with the Delaware & Hudson Co. This possession was not adverse, and even if it was, no title could be acquired by the defendants as against the plaintiff, the statute of limitations not running against it. V. S. 3745. We treat this land as within the surveyed location of the plaintiff's road, and the possession of the Delaware & Hudson Co. of their track within the surveyed location, as the possession of the plaintiff. It is the only sensible construction to be given the finding of facts. It is clear the plaintiff never abandoned the land now claimed. The defendants began their occupation after the plaintiff's lease to the Central Vermont Receivers in 1870, and when the lease was renewed in 1891 the lessors required the lessees "to maintain the boundaries of the property." After 1891, the defendants paid rent to the Central Vermont, and although this agreement was made, and the rent paid, with the understanding that any rights the defendants might have in the premises were not to be surrendered nor invalidated by such payment nor agreement, it shows the plaintiff had not abandoned its claim to it, which was asserted immediately after the surrender of the lease in 1896, when these proceedings were brought. This point must be

ruled in favor of the plaintiff, none of the points raised being tenable.

The judgment of the county court is affirmed.

After the judgment was affirmed, the defendants were permitted to file in the supreme court a declaration for betterments. For authority to so file a declaration in this court, see *Beckley* v. *Willard*, 13 Vt. 533, in which cause it was done, and the case remanded for a trial upon the general issue on the questions relating to betterments. While a declaration for betterments must be filed in the county court in case a judgment becomes final in that court, the better practice, in case the ejectment cause passes to the supreme court, is to await the disposition of it in that court, before filing a declaration, for not until that time can it be known that one is necessary, or that the question of betterments is material.

RE PETER W. CARPENTER.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed November 28, 1898.

Habeas Corpus—Intoxication—Commitment for Refusal to Disclose.—The relator was convicted of intoxication before a justice, and ordered under the statute to disclose where he procured the liquor, and in default of disclosure was committed to jail. He now seeks relief on the grounds, first, that he has fully disclosed, and second, that he has not been allowed to disclose—positions which are inconsistent; but moreover the record shows that he was allowed to testify at length, and does not show that he fully and fairly disclosed. Hence the discretion of the magistrate cannot be revised in the absence of anything to rebut the legal presumption of his good conduct.

HABEAS CORPUS. The petition was addressed to the chief judge, before whom the relator was brought October 10, 1898, when the hearing was continued to the supreme court for the county of Caledonia, to be held at Montpelier on the 12th day of October, 1898, the relator being admitted to bail in the meantime.

The record showed that the relator testified before the justice to having received three gallons of liquor from Boston on the 23d of August, and to having drunk most of it before the 6th day of September when he was found intoxicated; that on the last day, being already somewhat intoxicated upon the liquor procured from Boston, he procured a further quantity which resulted in his complete intoxication. That the last named quantity he received after dark, in the school-house yard, from a person whom he thought to be S. P. Welch, a person well known to him in the daytime.

Dunnett & Slack for the relator.

This court having intimated in *Re Powers*, 25 Vt. 261, that upon *habeas corpus* it would not examine the proceedings of the magistrate *de novo*, the legislature passed the act which is now found in V. S. 1610, which entitles a relator imprisoned or confined by the order of any magistrate to the writ of *habeas corpus* returnable to the supreme court. V. S. 1602 further provides that the relator may deny any of the facts set forth in the return or statement and may allege and prove other material facts. From these two sections it is plain that the purpose of the legislature was to broaden the remedy of *habeas corpus*, and that the record is not to be taken as conclusive against the prisoner in a case like this. *Re Hardigan*, 57 Vt. 100; *Rhinehart* v. *Lance*, 43 N. J. 311.

The disclosure is the only test of its own sufficiency, and the magistrate cannot reject a disclosure which is full and fair upon its face, merely because on information received from some third person he doubts its truthfulness.

W. H. Taylor, State's attorney, for the State.

TAFT, J. The relator was convicted October 1, 1898, of the crime of intoxication, before a justice of the peace, and was ordered to disclose the place where and the person from whom the liquor so producing the intoxication was obtained and the attending circumstances, etc. Not making a disclosure satisfactory to the justice, he was on the fifth of the same month committed to the common jail until he should make such disclosure or be otherwise discharged by order of law. This petition for a *habeas corpus* was brought on the 10th of October, 1898, and the petitioner claims he is unlawfully imprisoned for two reasons: (1) That he has fully and fairly disclosed as required by the statute and (2) that the justice absolutely refused to hear any disclosure of the relator. The allegations are not consistent with each other. It is difficult to see how the relator could fully and fairly disclose if the justice absolutely refused to hear him. But considering both allegations, the record shows no refusal to hear the relator disclose but does show that he testified at length in regard to the matters which were the subject of the investigation. The other allegation, that he fully and fairly disclosed as required by the statute, is not established by the record. In the case of *Re Powers*, 25 Vt. 261, *Redfield*, C. J., states that the "magistrate has a discretion to determine when the person has made a full and fair disclosure in regard to the points upon which he is required to disclose." We cannot exercise the discretion for the magistrate. The presumption of the good conduct of a magistrate, to which every one is entitled until the contrary is shown, should be made in this case. The record before us does not disclose a case in which the magistrate, after a disclosure is fully and fairly made, persists in imprisoning the person called upon to disclose. What should be done in such a case and how the question should be determined are questions not before us, and we

are not required to discuss them, neither of the causes alleged in the petition being established.

The petition is dismissed and the relator remanded to his former custody.

STATE *vs.* JOHN CRUICKSHANK.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 26, 1899.

Judicial Notice.—A complaint upon a city ordinance must set it forth, as it is not within the judicial notice of the court.

Conclusion of Complaint on Ordinance.—Such a complaint properly concludes against the form of the statute, and perhaps should conclude against the form of the ordinance.

COMPLAINT to the city court for the city of Barre by the city attorney. Heard in that court on demurrer to the complaint August 6, 1898. Demurrer overruled. The respondent excepted.

Richard A. Hoar for the respondent, cited Bishop on Statutory Crime, (2d ed.) §§ 404–408; *State* v. *Soragan*, 40 Vt. 450; *Keeler* v. *Milledge*, 4 Zab. 142; 1 Archibald, Crim. P. &. P. 248; Wharton, Crim. P. & P. 9th ed., §§ 224, 225; *Shanfelter* v. *Baltimore*, 80 Md. 483; *Green* v. *Indianapolis*, 22 Ind. 192; *Harker* v. *Mayor of N. Y.*, 17 Wend. 199; *Porter* v. *Waring*, 69 N. Y. 250; 1 Dillon Mun. Corp. §§ 83, 414, 415.

G. T. Swasey and *John W. Gordon* for the State.

Although courts of general jurisdiction do not notice municipal ordinances, a city court will recognize them

because it bears the same relation to them which a state court bears to the laws of the State. *State* v. *Leiber*, 11 Ia. 407; *Laporte* v. *Goodfellow*, 47 Ia. 572; 1 Dill. Mun. Corp. (4th ed.) § 413; *City of Salomon* v. *Hughes*, 24 Kans. 211; *Lanfear* v. *Mestier*, 89 Am. Dec. 658 and note; Acts 1894, No. 165, § 77.

ROWELL, J. This complaint lacks substance. It alleges that the respondent did ride a bicycle along and upon the sidewalk on a certain street in the city of Barre, "in violation of sections twenty-five and thirty-six of chapter thirteen of the ordinances of said city," *contra formam statuti*. It should have set out the ordinances, as the court cannot take judicial notice of them. *State* v. *Soragan*, 40 Vt. 450.

It properly concluded against the form of the statute. *State* v. *Soragan*. Perhaps it should also have concluded against the form of the ordinances.

Judgment reversed, demurrer sustained, complaint adjudged insufficient, and cause remanded.

SCHOOL DISTRICT NO. 3 OF THE TOWN OF BETHEL *vs.* M. L. SHELDON, et al.

May Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed October 3, 1898.

Trust—Legatee as Trustee.—A fund was bequeathed to an incorporated school district to be invested and the income used for current school expenses. The probate court appointed a trustee. *Held*, that there was no occasion for the appointment, for the legatee had full power to execute the trust.

Trust—Chancery and Probate Jurisdictions.—But neither was there any occasion for the legatee to apply to chancery to order the legacy paid to it, the probate court never having been applied to for that purpose.

CHANCERY. Windsor county, April 12, 1898; *Tyler*, Chancellor; *pro-forma* decree sustaining the defendant's demurrer and dismissing the bill with costs. The orator appealed.

Hunton & Stickney for the orator.

Wm. Batchelder for the executors.

M. M. Wilson for Guy Wilson, trustee.

START, J. This cause was heard on the defendants' demurrer to the orator's bill. It is alleged in the bill that the orator was incorporated as a graded school district by No. 166 of the Acts of 1886; that Albert Whitcomb deceased at Bethel leaving a will, by which he gave the orator "thirty thousand dollars, the principal to be safely invested and the income only to be used each year for the current expenses of the school," and which provided that if the gift was not accepted, or if its conditions should be violated, the same should be given to, and divided among the three grandchildren of his brother, the late Elias K. Whitcomb; that the will was duly probated and the gift accepted, with its conditions, by the orator; that, on the 12th day of February, 1897, the probate court for the district of Hartford appointed the defendant Guy Wilson trustee of the fund so bequeathed to the orator, and ordered the same paid to him and that he should hold the same in trust for the benefit of the orator, according to the terms of the will; and that the orator had no notice of any application, petition or motion for the appointment of a trustee of said fund. The orator asks to have the legacy paid to it, and insists that the probate court, in appointing a trustee not named in the will, has exceeded its authority, and that its order, in that respect, is absolutely void and a nullity.

By the will the sum of thirty thousand dollars is given to the orator in trust. The purpose of the trust is declared in the will, and we think the testator intended the trust should be executed by the orator. The gift is direct to the orator, in trust. The principal is to be safely invested and the income only used for the current expenses of the school. It is clear the testator intended that the orator should accept the trust and perform the conditions attached to the gift, for he provides that if the gift is not accepted, or if its conditions are violated, the same shall be divided among his brother's grandchildren. The orator was incorporated for the purpose of providing educational advantages to the youth within its territorial limits, and it has power to execute the trust. *Town of Barre as School District* v. *School District No. 13 in Barre*, 67 Vt. 108. The testator by bequeathing the sum of thirty thousand dollars to the orator in trust, and defining the purpose of the trust, has named a trustee capable of taking and executing the trust; and there is no occasion for the appointment of a trustee by this court. The probate court has jurisdiction to decree distribution of the estate under the will, and the orator is capable of taking the money bequeathed to it and administering the trust.

The orator does not show by its bill that there is any occasion for the appointment of a trustee, or that it has resorted to the probate court for the recovery of the legacy, or that it has not an adequate remedy in that court; therefore, it does not make a case over which this court has jurisdiction, and the bill must be dismissed and the orator left to pursue its remedy in the probate court.

The pro-forma decree of the court of chancery is affirmed, with costs, and cause remanded.

LOUIS F. BREHMER *vs.* WHITELAW LYMAN, et al.

May Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and START, JJ.

Opinion filed October 3, 1898.

Negligence—Expiration of License.—Case for negligence against the owner of a building in which the plaintiff was injured by falling through an opening in the floor. The room was being used for rehearsals by an amateur dramatic company under a license from the owner which by its terms was to expire when it became necessary to repair the room. The plaintiff was a musician employed by the company. The repairs had been commenced before the accident occurred, and the opening had been made in the course of them. *Held*, that the plaintiff was a trespasser, and the suit without foundation,

Case. Plea, general issue. Trial by jury at the September term, 1897, Rutland county, *Munson*, J., presiding. The jury after due deliberation failing to agree, a verdict was directed for the defendant, and the plaintiff excepted.

J. A. Merrill and *G. E. Lawrence* for the plaintiff.

Butler & Moloney and *J. C. Baker* for the defendant.

START, J. The action is case, for the recovery of damages sustained by the plaintiff by reason of falling through an opening in a block where the floor had been taken up to make repairs. The court ordered a verdict for the defendants, to which the plaintiff excepted.

The general situation and condition of the building were not in controversy. The injury was received in a three-story brick block, known as the Billings block. The defendants, Betsey C. Sparhawk and Vida Billings Grout, were the owners of the block, and the defendant, Milo Lyman, was the superintendent of the repairs being made.

The Billings block was originally a three-story brick block. The lower floor was divided into two stores, with a

stairway between them leading from the sidewalk on the street to the second floor. The third floor was used by the lodge of Odd Fellows for a hall and other rooms. To increase the size of the store on the south side of the stairs, and to furnish another room for that store, a wooden addition was built several years ago, against the rear of the block. This addition was of the height of the first story only and had a tin roof. Some three or four years before the injury complained of, the owners of the block erected a frame addition to the block. In the erection of this addition, the one-story addition first referred to was not torn away, but the new one was built over and around it. On the second floor, the room of this addition was unfinished, except that a floor was laid in it, and it was partly lathed. A doorway was cut from the rear end of the hall leading into the unfinished room in the second story of the addition, and a floor was laid for a passage over the roof of the old addition from the hallway in the brick block to this unfinished room. This unfinished room was used as a store-room by the tenants of the block, and, in the summer of 1895, had considerable rubbish in it.

In the season of the year 1895, Wayne Bailey was the agent of the owners of this Billings block, and had the entire care and management of the block and of the renting of the rooms in it. It had been determined by the owners to have extensive repairs made upon the block that season, and Mr. Bailey had charge of them. Among the repairs to be made, according to the plan adopted, was the extending of a light-well from the store, through the second and third stories to a sky-light in the roof. This light-well was to occupy the space of the roof of the old first addition, and be extended therefrom to the sky-light. This required an overhauling of the Odd Fellows' hall and rooms, and a taking out of the floor where said passage-way was which led into said unfinished room and the old roof under it.

Before the floor in question was taken up, Mrs. Balcom

made application to the lodge of Odd Fellows to produce, under the auspices of the lodge, a dramatic musical entertainment, and terms were agreed upon. The Odd Fellows appointed a committee, consisting of Dr. Spencer, Dr. Martin and Mr. Carruthers, with power to act for the lodge. Mrs. Balcom was to furnish singers and drill them, and the committee was to furnish the orchestra and do the outside business. Mrs. Balcom held a few rehearsals in the Odd Fellows' hall and afterwards went into the unfinished room on the second floor of the block to hold them. No evidence was introduced tending to show any arrangement as to the use of the room, except a conversation between Dr. Marstin and Mr. Bailey. Dr. Marstin testified upon that subject as follows:

"I saw Mr. Bailey and asked him if this committee, or Mrs. Balcom, could have that room down there to rehearse in. I asked him if we could hire it; he said, 'no, you can have it and welcome until they go to making repairs; they are going to making repairs soon, and you can have it until then, if you have a mind to clean it out.' There was some rubbish in there."

Q. "Had you any notice whether after that you did take possession of it as such committee, direct the use of it for the purpose of these rehearsals?"

A. "We did take possession of it and used it."

Q. "When did you begin—When was this conversation with reference to the time this accident occurred, which was the twentieth of September?"

A. "Somewhere about a week or ten days previous to that."

Q. "At the time you had the talk with Mr. Bailey to procure the use of this room, that matter of changes and putting in this light, it was talked over and considered?"

A. "Yes, sir. It was talked over."

Dr. Marstin further testified that he told Mr. Bailey that Mrs. Balcom wanted the room, and no arrangement was

made for the Odd Fellows; that the Odd Fellows, or the committee, had nothing to do with it; that he told Bailey that he wanted that room for Mrs. Balcom, and did not think he told him he was a committee of the Odd Fellows; that what Bailey said was that they could have the room, and welcome, until it was wanted to commence the repairs; that the witness told Mrs. Balcom what arrangement was made with Mr. Bailey, and that they could have the use of the room until they commenced the repairs. The witness also testified that he knew the repairs were commenced before the plaintiff received his injury; that they had commenced repairs before the accident, and had torn up the floor going into this room; that the repairs Mr. Bailey and he talked about were the putting in of the light-shaft, and he knew they had been at work on that for some time, more or less; that he knew that those repairs would necessitate the tearing up of the floors of both stories; that he understood Bailey to mean the putting in the light-shaft as the repairs referred to; and that he understood the license terminated when they wanted to put in the shaft, which would prohibit going into the room.

Mr. Bailey testified to the conversation substantially the same as Dr. Marstin, and that Dr. Marstin knew of the plans for repairs. He gave the conversation more in detail, but to the same effect. This was all the evidence there was upon the subject of any conversation between any one and the owners of the building or their agents, as to the use of the room.

On the evening of the accident, when Mrs. Balcom went to the room, the floor of the passage-way was taken up, the boards thrown into the room that had been used for rehearsals, and plank laid across the passage-way to this room. Mrs. Balcom testified that Mr. Moore told her that it was a dangerous place, that she could never rehearse there and that she replied, "I can fix that."

Wlliam P. Horton, the Noble Grand of the lodge, came

upon the scene soon after Mrs. Balcom. He found this floor up and the situation as it stood when Mrs. Balcom got there, and at her request, he fixed the passage by making a temporary bridge or floor, and set up a board at each edge.

The testimony of the plaintiff tended to show, that he was a member of a band of musicians, of which his brother, Philip H. Brehmer, was the leader; that said leader had been employed by the committee of Odd Fellows to furnish an orchestra for the entertainment aforesaid; that, on the evening of the 20th day of September 1895, the plaintiff was directed to attend a rehearsal in the unfinished room on second floor of the Billings block, to be conducted by Mrs. Balcom; and that about nine o'clock in the evening he went in accordance with said order, and in going to said room over a temporary flooring, put down in said passage-way, said old roof and flooring over the same having been removed, the plaintiff fell, or was thrown off the passage and into the store below, and suffered the injuries complained of.

Giving the testimony the most favorable construction for the plaintiff, it shows that the only right Mrs. Balcom or any other person connected with the entertainment had to the room, was a naked license to use it for rehearsals until the repairs, which required the floor of the passage and old roof to be taken out, commenced; and when the defendants commenced the repairs, the license terminated by its own limitation. While the license was in force, it relieved the licensee from liability for entering and occupying the room; but, when the license terminated by its own limitation, all attempts to use the room for rehearsals were acts of trespass and wholly without right.

The plaintiff was not on the defendants' premises by their invitation, permission or procurement. He was there by the invitation of the party whose license to use the room had terminated by its own limitation, and the defendants owed him no duty of protection against such accidents as might

happen to him by reason of the unsafe and dangerous condition of the passage-way. *Fay* v. *Kent*, 55 Vt. 557; *Stevens* v. *Nichols*, 155 Mass. 472; *Metcalfe* v. *Cunard Steamship Co.*, 147 Mass. 66; *Reardon* v. *Thompson*, 149 Mass. 267; *Bedell* v. *Berkey*, 76 Mich. 435: 15 Am. St. 370.

Negligence consists in the commission of some lawful act in a careless manner, or in the omisssion to perform some legal duty to the injury of another. It is essential to a recovery in the latter case, to establish that the defendant owed, at that time, some special, clear, legal duty to the plaintiff, or the party injured. *Nicholson* v. *The Erie Railway Co.*, 41 N. Y. 529.

To authorize the submission of the question of liability to a jury, in an action for negligence, the evidence must fix or tend to fix upon the defendant some personal fault, or its equivalent. *Martin* v. *Pettit*, 117 N. Y. 118. The evidence did not tend to fix upon the defendants, or any of them, any legal duty respecting the matter complained of, and the court properly ordered a verdict for the defendants.

Judgment affirmed.

ELLA WILKINS *vs.* HOMER METCALF.

May Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ

Opinion filed October 15, 1898.

Evidence—Self-serving Acts and Expressions.—Upon trial of a complaint for bastardy, the defendant is not entitled to show that ten months before the time of the alleged act he had protested to his father against his employing the complainant as a servant in the house on the ground that she was of bad character. Such act and declaration do not fall within the rule which admits the conduct and expressions of the party

in his own favor when the subject of inquiry is the existence of a mental condition or purpose, for they had no tendency to show that he would not ten months later, or even at the time, have committed the act complained of.

Cross-examination—Question too Broad.—A witness testified that about the time when the child must have been begotten he was a member of the same household with the complainant and defendant and observed their conduct, but neither saw nor heard anything improper between them. On cross-examination it was proposed to ask him "if he did not think at that time, from what he saw take place between the parties, that their relations were not exactly as they ought to be, and that there was something not right between the complainant and the boys," referring to the defendant's younger brothers. *Held*, too broad and properly excluded in the discretion of the court.

Self-serving Declarations.—The defendant's mother, being an important witness in his favor, was properly inquired of in behalf of the complainant as to having received a letter referring to her son's relations with the complainant, and what action she took thereupon; but the court properly excluded the statements contained in the letter, and other statements brought to the mother by a neighbor, which were nothing more than the complainant's declarations in her own favor that the defendant was the father of her child.

Fixing Date.—The defendant, having testified to seeing the complainant in the act of sexual intercouse with one George Metcalf at the important time, was properly allowed to add, as aiding him in fixing the date, but not as corroborating his testimony, that he told certain named persons of it soon after its occurrence.

Self-serving Declarations.—It was error to allow the defendant's father to testify to what the defendant told him regarding a confession by the complainant.

Deposition—Exception—Waiver.—It is the proper practice to ascertain whether the witness has knowledge of a party's reputation before asking what it is; but if that question is waived, the knowledge will be presumed from the general answer.

Deposition—Exception—Waiver.—Such preliminary question must be taken to have been waived when the only exception is to the form and substance of the deposition in which the answer occurs.

Deposition—Citation.—As the complainant was the party of record, notice of the taking of the deposition was properly served upon her, although the prosecution was under the control of the town.

COMPLAINT for bastardy. Trial by jury at the September term, 1897, Chittenden county, *Taft*, J., presiding. Verdict and judgment for the defendant. The complainant excepted. The prosecution was controlled by the town of Underhill under V. S. 2725.

Henry Ballard and *J. J. Monahan* for the complainant.

L. F. Wilbur and *V. A. Bullard* for the defendant.

TYLER, J. Complaint for bastardy. It appeared on the trial in the court below that the child was begotten in July or August, 1896, and was born May 3, 1897. The complainant had been a servant in the family of the defendant's father, at one time from March, 1893, to March, 1894, and again from October, 1895, to October, 1896, and occupied a room near that of the defendant.

(1) The defendant claimed, and his evidence tended to show, that during the complainant's last year's service for defendant's father, he and the complainant were not on friendly terms with each other, that they had but little to do with each other, and that they quarrelled considerably. The complainant's evidence tended to show the contrary—that their only quarrels were "lovers' quarrels," the result of mutual jealousy and of charging each other with associating with other persons.

The defendant was allowed to show, and did show against the objection of the complainant, that the defendant objected to and protested against his father's hiring the complainant the last year she worked for him, upon the ground, "that she was not a proper and fit person to have as a member of his family in the position of a hired servant, by reason of her bad character and reputation." It did not appear and it was not claimed by the defendant that the complainant had any knowledge of such objection and protest upon his part. To the admission of the evidence the complainant excepted. We think its admission was error. It was held in *Schlemmer* v. *State*, 51 N. J. L. 29: "That whenever the existence of a purpose, or state of mind, is the subject of inquiry, explanatory conduct and accompanying expressions of the party himself, or of other persons to him or in his presence, may be shown by proof." See *Danforth* v. *Streeter*, 28 Vt. 490; *Worden* v. *Powers*, 37 Vt. 619. So a party

may prove by others his own expressions of physical sensations or mental emotions, as of pain upon receiving a bodily injury, or of grief upon hearing of the circulation of defamatory stories concerning himself. In this case the defendant did not claim to have been hostile to or to have had an aversion to the complainant; his declarations were merely of his opinion or judgment as to her suitableness, on account of her bad character and reputation, to enter his father's family as a servant, and were made some ten months before the alleged act was committed. It is true that this evidence was not offered as tending to establish the *fact* of the complainant's bad character and reputation, and the jury could not legitimately have drawn such inference from it. It was offered to show the defendant's *opinion* of her, irrespective of what the fact was in this regard, and to render it less probable that, entertaining such opinion, he should have been on friendly and intimate terms with her and committed the act charged.

The defendant claims that the state of his mind regarding the complainant was a relevant fact bearing upon the main issue in the case, and that the evidence was admitted under the rule, that such fact may be proved by the party's contemporaneous declarations. But the fact that the defendant, in October, 1895, considered the complainant unsuitable to become a servant in the family for the reason assigned had no tendency to show that he did not commit the act alleged in July or August, 1896. His declarations were not contemporaneous with any relevant fact. His opinion respecting the complainant had no tendency to show his state of mind toward her in the direction alleged. If he held the opinion which he expressed he would not have been less likely to have committed the act than he would have been if he had believed her a virtuous woman. The declarations were too remote from any fact in issue, and they were calculated to prejudice the complainant's case.

The evidence admitted came within no exception to the rule, that proof of declarations made by a witness out of court are not admissible in corroboration of testimony given by him in court.

(2) The witness Whittiker testified that in July or August, 1896, he worked for the defendant's father about two weeks, and at night occupied a room between those occupied by the defendant and the complainant; that he observed the conduct of the parties, and that he neither saw nor knew of anything improper between them; that they said but little to each other and appeared unfriendly towards each other. On cross-examination the witness was asked if he "did not think at that time from what he saw take place between the complainant and the defendant that their relations were not exactly as they ought to be, and that there was something not right between the boys and Ella." The court upon objection excluded this question, to which the complainant excepted.

The relation of the parties during the time they were in each other's society was a relevant fact, and the witness having testified in chief upon the subject of that relation, it was the right of counsel to cross-examine him in respect to what he had observed. The question was objectionable in that it included the complainant's relation with "the boys," meaning, as we suppose, the defendant's younger brothers who slept in the room with him, which relation was irrelevant. In general, what a witness *thought* about a subject is immaterial and improper to state. It is sufficient for him to testify what acts he observed, and it is for the jury to *think* and pass judgment upon them. But here the witness had testified in chief that he had seen no improper acts or conduct between the parties, and if the question had directed his attention to some specific acts and called for his judgment upon them it would not have been error in the court to have admitted it; but this question was so broad as to what he saw during the two

weeks that it was in the discretionary power of the court, in the conduct of the trial, to admit or exclude it. 1 Greenl. Ev. §§ 447, 448 and notes.

(3) The defendant's mother, Mary Metcalf, was an important witness in his behalf. For the purpose of showing her interest and that she had been active in an attempt to shield her son and to induce the complainant to swear the paternity of the child upon some other person, the complainant's counsel made the following offer: "I offer to show that this witness received a letter from Mrs. Blake while Ella was living with her, referring to the matter of the relations of her son with Ella, stating the fact that Ella said that this defendant, her son, was the father of the child, and suggesting that she see Mrs. Whittiker; and immediately following that, on the same day, Mrs. Whittiker went to Mrs. Blake's to see Ella to find out all she could about it and come back and report to her."

The court permitted it to be shown that the witness received a letter referring to her son's relations with the complainant. The ruling was correct that it was competent to show what action the witness took upon receipt of the letter, but that it was not competent to show any statement contained in the letter purporting to have been made by the complainant respecting her child's paternity. The evidence would have been mere hearsay. It was a declaration made by the complainant to a third person in her own favor, and fell under no exception to the rule which excludes such evidence. For the same reasons it was incompetent to show what report Mrs. Whittiker brought back to the witness in respect to the sayings of the complainant upon the same subject.

(4) The defendant claimed that one George Metcalf might have been the father of the child, and testified that on the evening of August 2, 1896, he saw the complainant and George Metcalf in the act of sexual intercourse; and he was permitted to testify that he told Quinlan and Whittiker

of it soon after its occurrence. Evidence of this kind is sometimes admissible for the purpose of identifying an occasion or fixing a date. *Ross* v. *Bank of Burlington*, 1 Aik. 43; *Hill* v. *North*, 34 Vt. 604. The defendant's counsel claim in their brief that this evidence was admissible to fix the time of the alleged act, and it is not claimed that it was admissible for any other purpose. The time of the alleged act was evidently material, it being about nine months prior to the birth of the child. The fact that the defendant mentioned it to others might have aided him in fixing the date in his mind. As error must be affirmatively shown, it must be assumed that the trial court held it admissible for that purpose and not in corroboration of the defendant's testimony as to the act itself. In this there was no error.

(5) Evidence that the complainant opened the cellar door on an occasion and assisted some young men to obtain cider, was properly admitted if it had any tendency to show that the complainant had intimate relations with other young men than the defendant; but the testimony of the defendant's father that the defendant told him that he, the defendant, had a conversation with the complainant in which she at first denied and then confessed that she admitted the boys to the cellar, was improperly allowed. It was also error to admit the testimony of Whittiker as to the sayings of the defendant to him about the cellar being opened and the cider taken.

(6) It was not error to admit the deposition of Helen M. Clark. As the complainant was the party of record in the suit, notice of the taking was properly served upon her. The deposition was admitted subject to any legal objection as to form or substance, but no specific objection was pointed out and none appears in the exceptions. The only point made in the brief of complainant's counsel is that the deponent was not shown to be competent to testify upon the subject of defendant's reputation for chastity. It is the

usual and proper practice, as counsel claim, to ascertain whether the witness has knowledge upon the subject of the party's reputation, but that preliminary question may be waived, and then the competency of the witness would be assumed from the answer given. It must be considered as having been waived in this case, for the general exception to the form and substance of the deposition did not include the question of the deponent's competency.

Judgment reversed and cause remanded.

LEANDER C. CARPENTER *vs.* ALMENA P. COOK, admx.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Opinion filed November 30, 1898.

V. S. 3573.—The defendant is held liable under V. S. 3573 for damages done by her animals straying and taken upon occupied land of an adjoining owner, the division line between the properties being the middle line of a pent road, so that neither party was bound nor could have been permitted to maintain a fence upon the line.

Adverse Occupation.—The defendant did not gain a right to the plaintiff's part of the pent road by her acts of occupation, for they were not adverse but only the ordinary use of the land for highway purposes in common with the public.

Prescriptive Right to Have Fence Maintained.—It is not decided whether the defendant could in any event have acquired by prescription the right to have the plaintiff maintain a fence and closed gate upon his own premises, for in this case they had not been maintained continuously for fifteen years.

This Case Distinguished.—When this case was here before—67 Vt. 101—it was decided upon the pleadings, which showed that the pent road was wholly upon the land of one of the parties, so that it was then necessarily held that said statute, which now determines the case, did not apply; for as the case then stood the fence upon the margin of the road was the division fence, and the plaintiff by removing it was the author of his own injury.

TRESPASS on the free hold. Heard on referee's report, June term, 1898, Orange county, *Start*, J., presiding. Judgment for the defendant. The plaintiff excepted.

John H. Watson for the plaintiff.

George F. Morris for the defendant.

TAFT, J. The land of the plaintiff adjoins that of the defendant. The defendant's horses passed from her land across a pent road into the plaintiff's dooryard. The pent road is partly upon the land of each. The division line between the lands at the point in the road over which the horses passed, is substantially the center line of the road. The defendant has maintained no fence on her side of the pent road. The plaintiff has maintained a fence on his side, in which was a gate, adjoining his dooryard, for convenience in passing to and from his premises. At times the gate was closed and at other times open. At this point the fence maintained by the plaintiff is on the side of the pent road and wholly on his land. The division line between the lands being the center line of the highway, no fence can be maintained thereon. It would constitute a nuisance if erected. The case is governed by V. S. 3573, which reads:

"When the lands of two or more individuals are so situated that either is not compelled to make and maintain a fence on the dividing line between their lands, by reason of open or unoccupied lands or highways lying between, each owner or keeper shall be liable for the damages done on the occupied lands of others by an animal straying from his lands and being taken on such occupied lands."

The parties were not compelled to make and maintain a division fence between their lands, for the highway was lying between and the division line was the center of the highway. The defendant is liable, under the statute above recited, for damages done on the plaintiff's occupied land by her animals straying from her land and taken on that of the plaintiff.

The referee finds that the plaintiff has title to a part of the land within the limits of the pent road, substantially to the center, if he "has not become limited in his right by the acquiescence and acts of his grantors, or by his own acquiescence and acts." There is nothing in the report which has any tendency to show that the defendant has gained any right to the plaintiff's land. She could gain it only by adverse possession. She, nor her predecessors in title, never claimed it, and never occupied it except to use it as a highway in common with the public.

The fence which the plaintiff has at times maintained between his doorway and the pent road was wholly on his own land. The defendant claims that she is entitled by prescription to have the plaintiff maintain and keep up the fence and gate. Conceding that if the plaintiff had so kept and maintained this fence and gate for fifteen years continuously, the defendant would be entitled to the right by prescription to have it kept up and maintained thereafter, a question upon which we express no opinion, it does not appear that it was kept up and maintained except "at occasional intervals," "occasionally," and the referee finds the gate was open "much of the time during the year," and the report does not show that the fence was kept up for fifteen years prior to the fall of 1871. Therefore the defendant has no prescriptive right in regard to the fence and its maintenance.

The case when before us as reported in 67 Vt. 101, differs in all essential respects from this. Then it was heard upon the pleadings and the court treated it like a case, as in fact it was, where "the road is wholly on the land of one, but contiguous to the land of another," and held that the rights and obligations of the parties in respect to fences remained unaffected by the existence of the road, and this upon the ground that the occupancy by the owner of a field over which a pent road was laid should not be interfered with by the road any farther than was necessary for the reasonable

use of it as a pent road. The case then was one in which the pent road was wholly upon the land of one, but contiguous to that of another, and the dividing line between the land of the plaintiff and that of the defendant was the southerly line of the pent road. It was held that the case was not within the statute,—V. S. 3573 above quoted.

This was clearly correct as the case then stood. The pent road then in question did not lie between the lands of the parties but wholly upon that of the defendant. As the case now stands, it appears that the road at the easterly end, lies between the lands of the plaintiff and the defendant, partly upon both, and is a case clearly within these words of the statute: "When the lands of two or more individuals are so situated that either is not compelled to make and maintain a fence on the dividing line between their lands by reason of . . . highways lying between," etc. Upon the first hearing it appeared that the fence between the plaintiff's dooryard and the pent road was a division fence, and that he tore it down and was thus the author of his own injury. He had no right to tear down a division fence, even if he was under no obligation to maintain it, and maintain trespass for the damage resulting therefrom.

The defendant has brought no exceptions before us.

Judgment reversed and judgment for the plaintiff for two dollars damages and costs.

HENRY PLUMMER, by his next friend, *vs.* BENJAMIN M. RICKER.

May Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON and START, JJ.

Opinion filed October 3, 1898.

Keeper of a Dog, Who Is.—One who permits a dog to be housed, harbored and fed upon his premises and to become, as far as domestic animals may, a member of his family, is to be regarded as its keeper and liable for injuries inflicted by it, if he have notice of its vicious propensity.

Evidence of Viciousness.—That the dog was vicious might be shown by evidence of its acts that were unknown to the defendant, the defendant being shown to have had notice of its vicious character.

Exception.—An improper answer to a proper question is not ground for reversal.

Evidence—Exclamations in Sleep.—The plaintiff, a boy, claimed to have been attacked and bitten by the defendant's dog. As bearing upon his condition, in case the jury should find his story to be true, the trial court permitted the plaintiff father to testify that the first two or three nights after the boy was bitten he would drowse and then start up exclaiming, "Take him off, he is biting me!" *Held*, error.

ACTION ON THE CASE. Plea, the general issue. Trial by jury at the December term, 1897, Caledonia county, *Thompson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff, a young boy, claimed to have been attacked and bitten by the defendant's dog, as the plaintiff, with other children, was passing the defendant's house. The defendant testified that he was present on the occasion in question and that the boy was not bitten, but that he fell down in the road and hurt himself upon a stone; that the dog was present but did not stir from his place.

The witness Perkins testified to being at work as a plumber on the defendant's premises, on some day before the accident, when the dog was tied in the barn floor. The

defendant was not at home. The witness was then asked why the dog was tied, and began to answer, "He was tied, as I supposed," when he was interrupted by the court and instructed to tell only what he knew. The witness then completed his answer as follows: "to prevent our being bitten by him."

Bates, May & Simonds for the defendant.

Smith & Sloane for the plaintiff.

START, J. The action is case for the recovery of damages resulting from the bite of an alleged vicious dog. The plaintiff's evidence tended to show that the dog was given to the defendant's minor son; that he was kept at the defendant's house nearly all the summer and fall before he bit the plaintiff; that he had been seen to follow the defendant's team; that both the son and the dog made the defendant's house their home; that the dog had bitten one boy before at the defendant's house, of which the defendant was informed; and that the defendant stated that he would not have the dog killed. The court instructed the jury that if the defendant was the head of the family and suffered or permitted the dog in question to be kept on the premises, in the way such domestic animals are usually kept, as a member of the family, so to speak, in so far as a house dog can be termed a member of one's family, then, within the meaning of the law, he was the keeper of the dog, and the same duty was imposed upon him as such keeper to restrain him, if he was aware of his propensity to bite persons, that would have been imposed upon him had he been the actual owner. The court also told the jury that if the son was stopping at the defendant's and the defendant permitted him to have the dog there, and permitted the dog to make that place his home and to be, as much as a dog can, a member of his, the defendant's, family, then the dog would not be there casually in the sense indicated; and the duty explained would arise and rest upon the defendant to see

that while he was thus there he was properly restrained, if he knew that he was accustomed to do that which in law amounts to being accustomed to bite persons. The defendant excepted to what the court said would in law constitute a keeper of the dog, and to what the court said about the keeping of the dog at the defendant's place by the son.

In these instructions there was no error. If the defendant housed, harbored and fed the dog in the way such animals are usually kept by owners, and permitted him to be a member of his family, in so far as such domestic animals can be members of families, he may well be regarded as the keeper of the dog. In *Barrett* v. *Malden & Melrose Railroad Co.*, 3 Allen 101, under a statute rendering the keeper as well as the owner of a dog liable to any person injured by him, it was held that the fact that the dog was kept on the defendant's premises by a person in its employment, who had the charge and superintendence of its stable, with the knowledge and implied assent of its general manager or superintendent, was sufficient to warrant the jury in finding that the dog was kept by the defendant. In *Cummings* v. *Riley*, 52 N. H. 368, it is held that if the head of a family, having the possession and control of a house or premises, suffers or permits a dog to be kept on the premises, in the way such domestic animals are usually kept, such head of the family may be regarded as the keeper of the dog. In *Harris* v. *Fisher*, 115 North Carolina 318: 44 Am. St. 452, it is held that the owner of premises, who, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits such a dog to run at large, is liable for any damage done by the dog to a passer-by.

It was incumbent upon the plaintiff to show that the dog was vicious, and for this purpose the testimony of Homer Varnum, a former owner of the dog, was properly received, notwithstanding the vicious acts testified to did not come

to the defendant's knowledge. It was sufficient to show by other evidence that the defendant knew that the dog was vicious. *Corliss* v. *Smith*, 53 Vt. 532.

There was no error in allowing the witness, Norman Perkins, to state how the dog was kept on the defendant's premises while he was there, nor in allowing the plaintiff to ask the witness why the dog was tied. The question was proper, and error cannot be predicated upon an improper answer. *Cutler and Martin* v. *Skeels*, 69 Vt. 154.

The plaintiff's father being asked to describe in a general way how the plaintiff appeared from the time he was bitten down to the time the sore healed, stated that he was very nervous the first two or three days, that nights especially, the moment he would drop into a drowse, he would jump up and call, "Take him off," the dog was biting him. The court, in holding that this testimony was admissible, said, "If the boy's story is found to be true, it tends to show that the dog made a visible attack upon him, and that has a bearing upon the question of how it may have affected his nerves, impressed itself upon him. We think that, if it should be found that it so impressed him that when asleep the impression followed him, made him nervous and caused him to cry out, it is evidence indicating the condition of the boy. It is not evidence tending to show the dog ever bit him." To this ruling the defendant excepted.

Under this ruling the jury were at liberty to consider the words spoken by the plaintiff while in sleep, upon the question of how the attack of the dog impressed itself upon him and affected his nerves. Words spoken while in sleep are not evidence of a fact or condition of mind; they proceed from an unconscious and irresponsible condition; they have little or no meaning; they are as likely to refer to unreal facts or conditions as to things real; they are wholly unreliable, and a jury ought not to be allowed to guess that such expressions are produced by a present mental or physical condition. The expressions of a person respecting

a past mental or bodily condition cannot be shown by a non-professional witness. The testimony of such a witness is confined strictly to such complaints, expressions and exclamations as furnish evidence of a present existing pain or malady. *State* v. *Fournier and Cox*, 68 Vt. 262; *Knox* v. *Wheelock*, 54 Vt. 150. The expressions of a person in sleep may be induced without cause and by past as well as present conditions. In dreams things long forgotten return, and we live over a past that has no relation to present conditions, and exclamations then made are as likely to be induced by a past as by a present condition. If what the plaintiff said while in sleep can be given any meaning, it was narration of a past event and did not indicate his present mental or physical condition, and the testimony was hearsay and inadmissible. *State* v. *Fournier and Cox*, *supra*. In *People* v. *Robinson*, 19 Cal. 40, it is held that words spoken in sleep are not admissible in evidence.

Reversed and remanded.

J. E. PRESCOTT *vs.* ALONZO STARKEY, et al.

May Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed October 3, 1898.

Replevin a Statutory Action.—The right to maintain replevin for goods did not exist at common law, but is conferred by statute, and must therefore be exercised under the restrictions which the statute has imposed.

Exempt Goods—Not to be Replevied by Officer.—V. S. 1470, which provides that when goods of the value of more than $20 are attached on mesne process and are claimed by "a person other than the defendant in the suit," such person may cause them to be replevied, does not permit attached goods to be replevied by the defendant, even though by statute they be exempt from attachment.

REPLEVIN. Plea, the general issue. Trial by jury, at the March term, 1898, Windham county, *Taft*, J., presiding. Verdict and judgment for the defendants. The plaintiff excepted.

Waterman, Martin & Hitt for the plaintiff.

Clarke C. Fitts and *Haskins & Schwenk* for the defendants.

TYLER, J. It appeared on the trial in the court below that the defendants Crosby & Adams were proprietors of the Brooks House in Brattleboro, at which the plaintiff, who is an oculist and optician, was a guest; that the defendants brought a suit against the plaintiff upon a claim that was not for the purchase price of the property replevied, and that the defendant Starkey, as a deputy sheriff, served the writ by attaching a trunk containing the personal wearing apparel of the plaintiff and his wife and a certain hand instrument that was used by him in his business in testing eyesight and fitting his patrons with eye-glasses, all of which property he claimed, and his evidence tended to show, was exempt from attachment. Demand was made for a return of the property upon the ground that it was exempt from attachment, and upon the defendant's refusal to return it this action of replevin was brought. The testimony which is referred to does not change the case stated in the exceptions. Upon the evidence of the plaintiff the court held, *pro forma*, that the action could not be maintained, directed a verdict for the defendants, and entered judgment thereon, and the case comes here upon the exceptions.

The case must be disposed of in this court upon the ground that the property was exempt from attachment, and in accordance with the provisions of V. S. 1470, which reads: "When goods of the value of more than twenty dollars are unlawfully taken or unlawfully detained from the owner or person entitled to the possession thereof, or

when goods or chattels of such value, which are attached on mesne process or taken in execution, are claimed by a person other than the defendant in the suit, or debtor in the execution, such owner or other person may cause them to be replevied."

The right to maintain replevin for goods did not exist at common law but is conferred by statute; therefore it must be exercised under the restrictions which the statute imposes. The words, "other than the defendant in the suit, or debtor in the execution," employed in V. S. 1470, seem to exclude the plaintiff in this suit from the use of this form of action. *Collamer*, J., said in *Dow* v. *Smith*, 7 Vt. 469, "For taking property exempt from execution, *trespass* has ever been the form of action in this State." See *Eddy* v. *Davis*, 35 Vt. 247; *Sprague* v. *Clark*, 41 Vt. 6.

Even if the right existed at common law, as is insisted by some of the authorities, that right is restricted by the words above quoted.

The legislatures in several of the states have passed acts enabling the debtor to replevy exempt property when taken upon mesne process or execution, and in this State it may be *casus omissus** for it is reasonable that the debtor should be permitted to replevy household furniture, or provisions necessary for upholding life, or tools necessary to carry on his trade, when seized by his creditors; but it is the duty of the court to construe the statute as we find it, and for the legislature to amend the statute if considered unjust.

Judgment affirmed.

TYLER, J., with whom concurs THOMPSON, J., dissenting. I am not able to agree with the majority of the court in the disposition of this case. I concede, however, that, if the latter part of § 1470 relates to exempt property, the debtor

*The omission, if one there was, is supplied by Acts 1898, No. 41, amending V. S. 1470. REPORTER.

is excluded from the use of the action of replevin; but whether it does relate to such property or not is a fair question for discussion. The precise question has never before been considered by the court. In *Sullivan* v. *Davis*, 50 Vt. 648, and in *Steele* v. *Lyford*, 59 Vt. 230, the action was replevin against officers for exempt property that had been taken by them on mesne process, as in this case; but both cases turned upon the question whether the property, in the circumstances, was exempt: no suggestion was made by counsel for the defendant in either case that replevin would not lie, and the court did not consider the question. In the former case counsel for the plaintiff seems to have made the point in his brief that replevin was the proper action.

The reasoning of the court in *Briggs* v. *Gleason*, 29 Vt. 78, has some application here, though the property attached was not exempt. In that case replevin for a mare was brought by the defendant in the suit against the attaching officer upon the ground that the officer had put the mare into the hands of a third person who cruelly worked and treated her, though the defendant, who was the owner, had remonstrated with the officer against his putting the animal to such use. The county court held that replevin would not lie, though the act of the officer made him a trespasser *ab initio*. In discussing the question whether the process was any protection to the officer, this court remarked; "The whole proceedings under the process is justly regarded as mere finesse, and the shield of its protection is wholly withdrawn, and the officer stands a naked trespasser from the beginning, the same precisely as if he had never had any process;" and for that reason the court held that replevin would lie and reversed the judgment.

In the case above cited and in the one at bar the process was lawful. My point is that in the latter case the officer is without the protection of the law for taking property which the law has declared shall not be taken for debts, the same as in the former where the property was attachable but the officer put it to an unlawful use.

The authorities are somewhat in conflict in respect to the common-law rule upon this subject. It must be conceded that the fact that many of the states have enacted statutes like V. S. 1470, enabling the owner of property attached upon the debt of another person to replevy it, shows that the legislatures of those states have understood that chattels, when attached, were in the custody of the law, and could not be replevied by the owner, though a stranger to the suit.

Parsons, Ch. J., said in *Illsley* v. *Stubbs*, 5 Mass. 280, . . . "But chattels in the custody of the law cannot at common law be replevied—as goods taken by distress upon a conviction before a justice, or goods taken in execution—and by parity of reason, goods attached by an original writ, as security for the judgment, cannot be replevied; but if the goods are wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer; for the common law would not grant process to take from an officer chattels, which he had taken by legal process already issued." It was so held in *Kellogg* v. *Churchill*, 2 N. H. 412, and in *Smith* v. *Huntington*, 3 N. H. 76. See notes to *Kellogg* v. *Churchill*, 9 Am. Dec. 104.

In the notes to *Dunham* v. *Wyckoff*, 20 Am. Dec. 695, Mr. Freeman quotes from an article in 12 Am. Jur. 106–108, where the writer contends that, as the action lies for a tortious taking of goods, replevin is the proper remedy at common law against an officer for chattels which he has attached or seized on execution, provided the plaintiff in replevin be not the debtor. The writer says: "An officer is not justified in seizing the goods of a stranger to the writ because they happen to be found in the possession of the defendant. In making such seizure he does not obey the mandate of his suit; he is a wrong-doer and a trespasser, and is entitled to no more consideration than if the goods had been taken from the possession of a stranger;" but

he concedes that the action of replevin ought not to be extended to cases wherein the plaintiff was the defendant in execution. In this concession Mr. Freeman does not concur, and says: "It does not harmonize with the present state of the law, and will very materially conflict with the spirit and thwart the objects of the modern exemption statutes. Certainly the defendant ought not to be encouraged in any proceeding tending to impair the legitimate effect of the judgment or of the writ under which the officer is acting. But the sheriff, upon a demand for exemption being made, has no more right to seize property exempt from execution than to take the chattels of a stranger to the writ." . . . "Upon principles of policy certainly the debtor whose wearing apparel or furniture or tools are intended by law to be exempt from seizure, ought to have the right to recover them at once, if unlawfully seized, instead of being turned over to an action of trespass or case, or some other equally tedious and inefficient common law remedy." Mr. Freeman further discusses this subject in his notes to *Van Dresor* v. *King*, 75 Am. Dec. 643, where after stating that there are authorities upon both sides of the question, and citing several, he says: "The rule of the common law, that property levied on under execution is *in custodia legis*, and cannot therefore be replevied from the possession of the levying officer, has been much modified in many states by statutes and codes of procedure, which permit this remedy to a stranger to the writ whose property has been levied on, and in many states to the execution defendant also whose exempt property has been taken. And even in the absence of statutes of this kind, logic and law would permit this remedy to the debtor." In his notes to *Carpenter* v. *Innes*, 25 Am. St. 257, he says: "The general rule may now be stated to be, that if an officer, either by mistake or design, levies on goods not the property of the defendant named in his writ of execution or attachment, or if the property for any reason is not liable

to be taken on the writ, replevin will lie against him at the instance of the injured party, no matter from whose possession the goods were so taken. This rule is sustained by an unbroken line of authority in nearly every state of the Union, with the notable exception already mentioned," referring to *Kittredge* v. *Holt*, 55 N. H. 621. See notes to *Philips* v. *Harriss*, 19 Am. Dec. 166. 2 Greenl. Ev. § 560, says if the goods of a stranger to the process are taken he may replevy them from the sheriff. 3 Kent's Com. 484, note; 20 Am. & Eng. Ency. 1041 *et seq.*

The court in its opinion in *Clark* v. *Skinner*, 20 Johns. 465, used some apt illustrations of the results of a holding that only trespass would lie: "If I leave my watch to be repaired, or my horse to be shod, and it be taken on a *fi. fa.* against the watchmaker, or blacksmith, shall I not have replevin? If the owner put his goods on board a vessel to be transported, shall he not have this remedy, if they are taken on execution against the master of the vessel? It seems to me indispensable for the due protection of personal property. In many cases, it would be mockery to say to the owner, bring an action of trespass or trover against the man who has despoiled you. *Insolvency* would be both a *sword* and a *shield* for trespassers. Besides, there are many cases, where the *possession* of chattels is of more value to the owner than the estimated value in money."

In some of the states the statute provides that the debtor may replevy exempted property when attached; in some states it is held that he is entitled to the action without the enabling act, and in others that he is not. See notes to *Kellogg* v. *Churchill*, *Dunham* v. *Wyckoff*, and *Van Dresor* v. *King*, *supra*. The general rule at common law now seems to be that the owner of goods may replevy them from an officer when attached by a third person, and upon the ground that property taken wrongfully is not in the custody of the law. It would be absurd to hold that, if the goods of A are taken upon a writ against C, either

by accident or design, they are so in the custody of the law that the owner cannot recover them,—that he must submit to a sale and have such sum in damages as he may be able to prove in an action of trespass.

If a stranger to the suit may replevy goods wrongfully attached there is greater reason for holding that goods which the law has exempted from attachment may be replevied by the owner when taken upon a writ or execution against him. Property cannot be in the custody of the law when so taken, for the reason that the legislature has expressly exempted it from attachment.

Gilman v. *Williams*, 7 Wis. 329: 76 Am. Dec. 219, was an action of replevin for exempted property, and it was held that "property is in the custody of the law when it has been taken and is held by legal process in a lawful manner and for a lawful purpose." The court said with reference to the goods attached, "but how could they be in the custody of the law unless the deputy marshal had a lawful right to take them into custody. The idea that an unlawful custody of property can be the custody of the law is simply absurd. . . . When property is lawfully taken by virtue of legal process, it is in the custody of the law and not otherwise; . . . there is no such thing as illegal custody."

The only just rule is that property wrongfully taken by an officer is not in the custody of the law—is not under attachment. It is true that it is sometimes questionable whether the debtor is entitled by his occupation to the exemption of certain property, as for instance, a team, and whether property is, from its nature exempt, but when it appears at the trial of the replevin suit, as in this case, that the property was in fact exempt, it would seem sufficient for the plaintiff to maintain his action.

By the laws of 1797, "one cow and such suitable apparel, bedding, tools, arms, and articles of household furniture as may be necessary for upholding life," were exempt from

attachment and execution. The same exemption was made in Slade's Statutes in 1824. Many additions were made by the legislature to the list of exemptions prior to and in the revision of 1839, wherein the provisions now contained in V. S. 1470 first appeared in our laws. R. S. ch. 30, § 14. It seems improbable that when by § 13, ch. 42, the legislature exempted from attachment certain articles as "necessary for upholding life," in another chapter it intended to preclude the debtor from the right to replevy them when attached. Such a coustruction of the statute would often be oppressive to the debtor and defeat the purpose of the exemption laws. It was consolingly said in an early case that the debtor might purchase his property at the sheriff's sale; but in the meantime he might be deprived of necessary clothing or furniture or provisions, or tools to carry on his trade, or valued heirlooms, and at the sale be obliged to pay an extortionate price or lose them, or he might not have means to purchase them at any price.

Replevin under V. S. 1465 is not an independent action, but is a mere appendage to the original suit. It is a proceeding for the compulsory receipt of property attached, and the condition of the bond is that it shall be returned to respond to the final judgment if one is recovered by the plaintiff in the action. *Green* v. *Holden*, 35 Vt, 314; *Driscoll* v. *Place*, 44 Vt. 252. Replevin under § 1470 is an adversary suit. The section is broad in its scope. It gives every owner and every one entitled to the possession of goods of the value of more than twenty dollars the right to replevy them when unlawfully taken or unlawfully detained, which is a right existing at common law; also any person who claims goods, except the defendant in the suit or the debtor in the execution may replevy them when attached on mesne process or taken in execution. I admit that the exception excludes the plaintiff from maintaining this action if the exempt property taken was under attachment when replevied, but I think it was not. V. S. 1805 exempted it

from attachment, and I think that § 1470 did not intend to include and has no reference to that class of property which, by a long series of enactments finally embodied in § 1805, the legislature has set apart for the debtor as not liable for his debts other than those contracted in the purchase of the exempted articles.

A case might arise where the debtor, being in possession of personal property attached upon a writ issued against him, as of stock upon a farm or goods in a store, claims that he is an agent or bailee and not the owner; then §1470 would preclude him from this action to regain possession, and give it only to the alleged owner, but that is not the present case.

It was an unreasoning adherence to the doctrine of *custodia legis* that led to the earlier decisions that property could not be replevied when taken by an officer upon a writ, though exempt by law or belonging to a stranger to the suit. Quoting the language of the court in *Gilman* v. *Williams*, *supra*: "The exemption laws are remedial and beneficent acts of legislation, and we are disposed to give them a liberal interpretation, and to administer them in the benign spirit in which they are enacted."

STATE *vs.* THOMAS S. MURPHY.

May Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed October 12, 1898.

Chancery May Abate a Public Nuisance.—Our State constitution, c. 2, § 5, by providing that the legislature might erect a court of chancery "with such powers as shall appear for the interest of the commonwealth," authorized the erection of a court of chancery with power to abate public nuisances.

Injunction—Contempt.—A court of chancery having received power to abate a public nuisance has authority to enjoin its commission and its maintenance, and consequently to punish for disobedience of its order.

Declaration of Right, Art. 10—Jury Trial.—A proceeding to abate a nuisance relates only to the property, and is to be distinguished from a prosecution for the crime of maintaining a nuisance. So a proceeding against one for violating an injunction against maintaining a nuisance, is an incident of the chancery suit, not a prosecution for a criminal offence, and the constitutional provision for a jury trial does not apply.

CHANCERY. Came on for hearing upon demurrer to the bill at the March term, 1898, Chittenden county, before *Thompson*, Chancellor, who rendered a *pro-forma* decree overruling the demurrer and making the temporary injunction perpetual. The defendant appealed.

The complaint alleged that from the 5th day of April, 1897, to the date of the complaint the defendant had kept, maintained and used as a place of resort a certain building in the city of Burlington, particularly described, in which building during all that time intoxicating liquor had been kept by the defendant with intent then and there to sell, furnish and give away the same without authority, to the common nuisance of the good people of the State and contrary to the form of the statute; whereby said building had become a common nuisance, and ought to be abated and enjoined; and praying for a subpœna and temporary and perpetual injunctions. The defendant was cited to show cause why a temporary injunction should not be issued, and having appeared, and hearing having been had, the temporary injunction was granted on the 24th day of April, 1897, by *Munson*, Chancellor. The complaint was returnable at the September term, 1897. The temporary injunction prohibited the defendant, his attorneys, servants, and agents from keeping and maintaining or using the premises described for the keeping of intoxicating liquor with intent or purpose of selling, furnishing or giving away the same without authority.

Seneca Haselton, for the defendant, presented an elaborate

brief to the point that for one hundred and fifty years before the adoption of our constitution of 1786 no injunction against a public nuisance had been granted by any court of chancery in England; but as the decision of the court is made without reference to this question, it is omitted here. The remainder of the brief may be summarized as follows:

The legislature of Vermont at its first session, that of 1778, adopted the common law, and in 1782 declared the common law of England, so far as not repugnant to the constitution and statutes of Vermont, to be the law of the State. The constitution of 1786 contained the provision, "that when any issue of fact proper for the cognizance of a jury is joined in a court of law, the parties have a right to a trial by jury which ought to be held sacred." This provision of the constitution is a sacred guaranty of the right of trial by jury, in all cases and upon all issues, so far as the right is in accordance with the usage and practice existing at the time of its adoption; and in view of the then existing state of the law absolutely secured that right to any person charged in any court in any proceeding whatever with the offence of maintaining a public nuisance.

Section 5 of our frame of government provided that a future legislature might erect a court of chancery with such powers as are usually exercised by that court or as should appear for the interest of the commonwealth. Even if this section gives the legislature authority to confer upon courts of equity jurisdiction over public nuisances as such, this jurisdiction can neither be granted nor exercised in such a manner as to infringe the right of trial by jury. *Charles River Bridge* v. *Warren Bridge*, 6 Pick. 376; *Powers* v. *Raymond*, 137 Mass 483; *Tabor* v. *Cook*, 15 Mich. 322; *State* v. *Peterson*, 41 Vt. 504.

But the statute of Vermont under which this information is brought not only undertakes to confer jurisdiction upon a court of equity without providing for a trial by jury, but expressly commands that "such suits, actions and

proceedings shall be entered, conducted, heard and determined in accordance with the usual course of proceedings in said court." V. S. 4528. The usual course of proceedings in chancery is determined in this State by the rules promulgated by the supreme court under legislative authority and do not permit of or in any way recognize a trial by jury. In only one case in the history of chancery proceedings in this State have issues been sent to a jury, viz: in *Adams* v. *Soule*, 33 Vt. 538. See *Briggs* v. *Shaw*, 15 Vt. 78, 785.

But even if the court of chancery might send an issue to a jury the verdict of the jury would be advisory merely, and therefore the constitutional right would not be preserved. *North Penn. Coal Co.* v. *Snowden*, 42 Pa. St. 488: 82 Am. Dec. 530; *Carleton* v. *Rugg*, 149 Mass. 550; *State* v. *Currier*, 66 N. H. 622.

Thus far the discussion has proceeded without reference to the question of whether this is a civil or a criminal proceeding. It should, however, be considered a prosecution for a criminal offence within the meaning of Art. 10 of the declaration of rights. The meaning of the phrase, "prosecution for criminal offences," is shown by contemporaneous legislative enactments to be synonymous with the phrase, "matters of a criminal nature." Slade's State Papers, 352, 452, 453.

In Massachusetts the writ of *supplicavit* was held to be a criminal proceeding. *Adams* v. *Adams*, 100 Mass. 365. See also *Deloohery* v. *State*, 27 Ind. 521. A case of the highest importance is *Boyd* v. *U. S.*, 116 U. S. 616, in which an information for the forfeiture of 35 cases of plate glass was held to be a criminal proceeding. See also *Counselman* v. *Hutchcock*, 142 U. S. 547.

It is immaterial that the offence has been created by legislation since the adoption of the constitution. *Plympton* v. *Somerset*, 33 Vt. 283; *Wynehamer* v. *People*, 13 N. Y. 378, 426; *State* v. *Peterson*, 41 Vt. 504.

Another provision of the statute which is clearly unconstitutional is that providing a hard-and-fast rule of punishment for contempt. It is for the judiciary, not for the legislature to settle the amount of fines in cases of contempt. *Re Cooper*, 32 Vt. 253, 257; *Blackstone* in the Lord Mayor of London's case, 3 Wilson 204: *ex parte Robinson* 19 Wall. 505; *Cartwright's Case*, 114 Mass. 230, 238; *State* v. *Frew*, 49 Am. Rep. 257.

What the legislature effects, if it effects anything, by providing that a specific act of contempt shall be punished by a specific punishment, is to create a substantial criminal offense triable like all other criminal offenses. Of this character is V. S. 5072.

The act under consideration undertakes to provide that on a charge of maintaining a liquor nuisance a person may be summoned before a chancellor and required to answer under oath, and be tried without a jury, and that evidence of reputation may be received, and that on the first conviction he shall be admonished or enjoined by the court, and on a second and every subsequent conviction shall be fined not less than $500, nor more than $1000, or imprisoned not more than six months, or by both such fine and imprisonment in the discretion of the chancellor. As opposed to the constitutionality of such legislation see the position of the dissenting judges in *Carleton* v. *Rugg*, *supra*. A recent decision in Iowa is suggestive of what will naturally follow the recognition of the constitutionality of such a statute. *McGlassons* v. *Johnson*, 53 N. W. 267. Blackstone's eulogium upon the trial by jury is exceedingly appropriate in this case. 4 Black. Com. 350.

Cushman & Mower also for the defendant.

In granting injunctions the court operates *in personam*. Kerr on Injunctions *p. 6; *McDonogh* v. *Calloway*, 7 Rob. (La.) 442; Spelling, Ex. Relief, § 1: Pom. Eq. Juris. § 1360. An injunction does not run with the land. Kerr on Inj. *p.

7; *Attorney General* v. *Birmingham, etc., Board*, 50 L. J. Ch. 786: Spelling, Ex. Relief, § 1126.

The mere fact that liquor is kept in a given place does not render that place a common nuisance. The question of nuisance depends upon the intent with which the liquor is kept. *Fisher* v. *McGirr*, 1 Gray 36; *Carleton* v. *Rugg*, 149 Mass. 550. The only real or professed effect of an injunction therefore would be to restrain the persons named from again committing the crime in the place described.

We had already statutes dealing effectually with the place where liquors were kept. Acts 1876, No. 33; Acts 1880, No. 14; R. L. 3837; Acts 1888, No. 46. It is apparent from these previous enactments that the purpose of the legislature in passing the act in question was not to strengthen the law touching the closing of the nuisance, but to circumvent trial by jury in a matter which the statute made a crime and which wholly depends upon the intent of the defendant touching the use to be made of liquors kept in the place complained of. V. S. 4528 adds strength to this inference.

By Chancery Rule 20 the defendant must answer under oath, and if the answer is insufficient, he may be committed under Rule 25, § 4. This case is therefore squarely within the doctrine of *Boyd* v. *U. S.*, 116 U. S. 616. *State* v. *Int. Liquor*, 55 Vt. 82, does not militate against this position, because it professes to deal exclusively with the property, and expressly declares that no penalty can be imposed upon the claimant, and no issue joined proper for the cognizance of a jury. But the language of the opinion in that case is not in keeping with the law of the State, for intoxicating liquor is not "outlawed" nor is it "a public enemy that when discovered the law smites." The statute recognized and still recognizes property rights in liquor and makes the sale under certain conditions legal. V. S. 4445, 4463.

The action is criminal in its nature. *Brown* v. *Walker*, 161 U. S. 616; *State* v. *Nowell*, 58 N. H. 314; *State* v.

Greenway, 92 Iowa 472: 61 N. W. 239. Other incidents of this proceeding which show that it is of a criminal and not a civil nature, are that it is brought by the State's attorney upon his oath of office, and subscribed by him in his official capacity, and that there is no recognizance for costs, nor any verification by a solicitor that it is brought according to the precedents in chancery as provided by Rule 8.

R. E. Brown, State's attorney, and *W. L. Burnap*, for the State.

The complaint sets forth the existence of a nuisance within the terms of V. S. 4512. The application for temporary injunction falls within the terms of V. S. 4525 and 4526, and such injunction was granted. V. S. 4529 provides a method by which evidence sufficient to sustain proceedings for injunction may be adduced.

This proceeding is merely a civil one for the abatement of a public nuisance and involves no punishment or penalty. The business sought to be enjoined is injurious alike to public welfare and public morals, and that it is indictable at common law as a public nuisance will hardly be controverted. *McClean* v. *State*, 49 N. J. L. 471: 9 Atl. 681.

Even if the acts prohibited by the statute do not constitute a nuisance *per se*, it is well settled that whatever is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact. *Carleton* v. *Rugg*, 5 L. R. A. 193.

The Mugler and Ziebold cases, 123 U. S. 623, arising under the Kansas statutes and passed upon by the U. S. supreme court under the 14th amendment, resulted in the vindication of a law similar to our own. The question again came up for consideration in *Re Debbs*, 158 U. S. 564, where a remedy in equity was invoked against interference with property rights amounting to a nuisance, and the positions sought to be established by the State in the present case were maintained.

Intent is not an element in nuisance cases. The intent of the defendant in doing that which is now forbidden longer to do is entirely immaterial under this statute. V. S. 4529.

The defendant was deprived of no property or property rights, but only forbidden to misuse his property to the injury of the public.

State v. *Currier*, 19 Atl. 1000, arose under a New Hampshire statute which contained no provision for a temporary injunction and provided no way in which the existence of the nuisance might be made to appear, nor that the injunction might issue if the fact were established to the satisfaction of the chancellor. In that case the existence of the nuisance was denied, while in the case at bar the existence of the facts is admitted by the demurrer. Thus that case as well as *Carleton* v. *Rugg*, *supra*, is easily distinguishable from the present.

The objection that the defendant by being compelled to answer is obliged to furnish evidence against himself in a criminal prosecution, is answered by the suggestion that the present is not a criminal but a civil proceeding. True the defendant must answer, but if the defense be a good one the bill must be dismissed, and if a truthful answer will not aid him, he may be silent, and will thereby be deprived of nothing except the right to use his property for an unlawful purpose. How then can it be said that he has been wronged?

To the objection that the law prescribes a specific punishment for contempt, we answer that when the violation of an order consists in a repetition or continuance of a forbidden act, it is within the legislative authority to measure the punishment as well as the judicial power. See *Mugler* v. *Kansas*, 123 U. S. 656.

TAFT, J. This is a proceeding in equity under the provisions of V. S. c. 187, to abate a nuisance. V. S. 4512 makes certain places where intoxicating liquor is sold, furnished or

given away, or kept for that purpose, a common nuisance and requires that the same shall be abated or enjoined as afterwards provided. Sections 4524–6 provide that an action may be prosecuted in the court of chancery, to abate and perpetually enjoin the same, and that any person violating the terms of an injunction granted in such proceedings shall be punished as for contempt by fine or imprisonment or both. A subsequent provision authorizes a temporary injunction, if the chancellor is satisfied that a nuisance actually exists or is being maintained.

This proceeding is to abate the nuisance described in the complaint, and the complaint is met with a general demurrer. That the premises described in the complaint are a public nuisance is admitted by the demurrer.

The first point made is that the court of chancery has no jurisdiction to abate a public nuisance. Whether equity has such power depends upon the authority given the legislature by the constitution of this State to create a court of chancery. There was no power given the legislature by the first constitution of this State to create one. Certain equity powers were given the common law courts. Chap. II., § 21. Upon the revision of the constitution in 1786 an amendment was added in these words, being § 5, chap. II.: "A future legislature may, when they shall consider the same to be expedient and necessary, erect a court of chancery with such powers as are usually exercised by that court or as shall appear for the interest of the commonwealth,—provided they do not constitute themselves the judges of the said court." This provision has remained intact until the present time. The legislature by the constitution of 1786 was thus authorized to erect "a court of chancery with such powers as are usually exercised by that court." It may be conceded as contended by respondent's counsel that at the time of the adoption of the constitution in 1786 a court of chancery did not have, and had not prior to that time exercised, the power

to abate a public nuisance. It is unnecessary to pass upon that question, for that power is given in the succeeding clause in which it is expressly stated that a court of chancery may be erected with such powers as are above stated and "as shall appear for the interest of the commonwealth." Under this clause the legislature is authorized to establish a court of chancery, and can endow it with power to abate a public nuisance if it appears that it is for the interest of the commonweal. If it has power to abate a public nuisance, it has power to enjoin its commission and its maintenance.

The violation of an injunction constitutes a familiar instance of contempt. It may be laid down as a general rule that when the court has jurisdiction of the parties, and the original power to grant the injunction, its violation is a contempt of the court which issued it. The power of a court to make an order carries with it the equal power to punish for the disobedience of the order.

The respondent contends that the statute is in conflict with provisions of the constitution of this State, particularly Article X. of the declaration of rights, which provides, "That in all prosecutions for criminal offences, a person hath a right to . . . a speedy public trial by an impartial jury of his country; . . . nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers." This claim is made, disregarding the distinction between a proceeding to abate a nuisance, which relates simply to the property which in its use constitutes the nuisance, and a prosecution of the respondent for the crime of maintaining it. The proceedings are different. A proceeding against the respondent for violating the injunction would be no more a criminal proceeding than would one against him for violating an injunction in a civil proceeding, or in a proceeding in reference to a private nuisance.

The reasoning of the supreme court of Massachusetts

in *Carlton* v. *Rugg*, 149 Mass. 550, is much in point. *Knowlton*, J., speaking of the proceeding to abate a nuisance, and one against the respondent for the crime of maintaining one, says: "The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by rules which relate to property, and it is only connected with persons through the property in which they may be interested."

The acts committed by a person in violating an injunction may constitute a crime, but the fact that a person is guilty of an offence against the criminal law and subject to punishment under it—in any prosecution for which he is entitled to the protection of the constitutional provision—is no bar to a proceeding against him before the chancellor or the judge granting the injunction, for a violation of it. To illustrate this point take the case of a libellee in a divorce cause who is enjoined from interfering with the custody and personal liberty of his wife, the libellant. In case he commit a grievous assault on her, he is guilty, under the criminal law, of the offence, and is, in a prosecution for such offence, entitled to a jury trial,—the judgment of his peers; but will any one contend that he cannot be proceeded against before the authority granting the injunction for his contempt in violating it, or would any lawyer advise that an adjudication of guilt of either offence could be successfully pleaded in bar of the other? We think not. Nothing further need be said upon this branch of the case than to refer to the reasoning of, and the cases cited by, *Brewer*, J., in *Re Debs*, 158 U. S. 564.

The decree overruling the demurrer and adjudging the bill sufficient was correct. The same is affirmed and cause remanded.

JOHN McKINDLY *vs.* JOHN H. DREW.

May Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER and MUNSON JJ.

Opinion filed October 1, 1898.

Harmless Error, if Error.—In an action for deceit in the sale of a policy of insurance, wherein the plaintiff might be entitled to recover back the premiums he had paid, it was proper for him to show when he first learned that he had been deceived; and although in showing this he was permitted to state what his counsel informed him as to the legal effect of the policy, the defendant was not prejudiced thereby, for the information was nothing more than what the defendant upon trial conceded to be the legal effect of the instrument.

Harmless Error, if Error.—A witness for the plaintiff, who was present by request of the defendant during a portion of the interview between the parties when the alleged false representations were made, was permitted to testify that he told the plaintiff that he had just taken such a policy and thought it a good thing. *Held*, that, whether strictly admissible or not, it could not have injured the defendant.

Harmless Error, if Error.—Upon the question of the value of the insurance to the plaintiff during the period when the policy was in force, an agent of another company was permitted to testify what the insurance could have been procured for in his company. The testimony may have been inadmissible, but it could have done no harm, as the plaintiff subsequently conceded that the value should be treated as a certain larger sum, and it was so treated by the jury.

Discrediting Party on Cross-Examination.—The plaintiff was entitled to discredit the defendant upon cross-examination by showing that the defendant's own version of the alleged fraudulent transaction was unnatural and unworthy of belief.

Damages.—The rule of damages announced when the case was here before —69 Vt. 210—was properly followed upon retrial below, the facts developed on both trials being essentially the same.

Deceit.—The defendant was not entitled to an instruction that the plaintiff could not recover if it should be found that the policy was read to him by the defendant; for there may be an actionable deceit concerning a technical writing whose terms are made known.

CASE. Trial by jury at the December term, 1897, Caledonia county, *Thompson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

This was a second trial of the case reported in 69 Vt. 210, and the tendency of the plaintiff's evidence was the same as at the first trial. It did not appear that the plaintiff ever expressly refused to pay further premiums or offered to return the policy.

The defendant's requests were as follows: (1) The plaintiff having failed to prove a rescission of the contract the case affords no basis for a computation of damages beyond a nominal amount. (2) But if the court hold that the plaintiff is entitled to actual damages, then the defendant is entitled to recover the difference in value between the policy that he in fact received and the policy that was represented to him by the defendant for the period of two years—two years being the term of the policy under the election of the plaintiff, he having elected to forfeit it at the end of that term. (3) That the sale was not complete as between these parties until the delivery and acceptance of the policy by McKindly, and if the jury find the defendant read over the policy to the plaintiff, as his evidence tends to show, the plaintiff cannot recover.

Upon the subject of the third request, the court charged that the contract was not completed until the policy was delivered to the plaintiff, and that if at the time of the delivery the defendant read it and made its meaning clear to the plaintiff, he would not be liable even if he had previously deceived the plaintiff; but that if in spite of such reading and explanation the defendant saw that the plaintiff was still laboring under the false impression which the defendant had previously and fraudulently made upon his mind, such reading and explanation would not purge the transaction of fraud.

The question of damages was submitted in accordance with the rule laid down by the supreme court, 69 Vt. 210.

Dunnett & Slack for the defendant.

W. P. Stafford for the plaintiff.

MUNSON, J. The plaintiff was permitted to testify that after paying the second premium and before the third became due, he read his policy through for the first time because of something he had heard, and that, not being able to understand it, he consulted counsel, and learned that it did not contain the guaranty nor permit the withdrawal which the defendant represented it did. The defendant claims that it was error to permit the plaintiff to state what he learned from his counsel. In view of the plaintiff's payment of the second premium it was permissible for him to show when he first learned of the deceit; and while this might have been done without repeating the statement of counsel, there was nothing prejudicial in the repetition, for it covered no more than was apparent from the policy, upon a construction conceded by the defendant.

One John H. Nelson was produced by the plaintiff, and testified that having just made application at his own house for a policy like the one in question, he went with the defendant at his request to the plaintiff's house, and was present at the opening of the interview between the parties. He afterwards testified, on cross-examination as is apparent from the question objected to, that he told the plaintiff what he thought of the policy. The plaintiff was then permitted to ask the witness what he told the plaintiff that he thought of it, and the witness replied that he told him that he had taken out the same policy himself, and that he thought it was a good investment. If the allowance of the question was a technical error, it is certain that the answer cannot have harmed the defendant.

The plaintiff was permitted, as a basis for estimating the damages, to show by a former representative of the Equitable Insurance Company that the cheapest policy that that company would have issued to insure the plaintiff for the two years in question would have cost a certain sum. Plaintiff's counsel afterwards conceded that in arriving at the damages the cost should be figured at a larger sum;

and the case was submitted to the jury upon the basis of this concession, and a verdict was returned accordingly. The evidence may have been improperly admitted, but if inadmissible it was rendered harmless by the action subsequently taken.

In giving his account of the interview in which the representations declared upon were claimed to have been made, the defendant testified that he told the plaintiff that the policy would be worth a certain sum "judged by the past experience of the company." The plaintiff was then permitted to draw from the defendant that the first policy of this kind that he knew of the company's issuing might have been as late as 1888, and that at the time he took plaintiff's application he did not know any policy of that class had matured or run twenty years, and that he could not have told that any had run ten years. The defendant claims that this was error because the representation so discredited was not one declared upon. But we think the plaintiff was clearly entitled to discredit the defendant by cross-examination upon any matter which he had testified to having stated in connection with the representations complained of.

The defendant claims it was error to permit the plaintiff to put in evidence certain parts of a rate book of the Mutual Life which the defendant had produced as the one he used in his interview with the plaintiff. The book being referred to and not produced, the exception need not be considered.

The court could not have complied with the defendant's first two requests to charge without disregarding our former holding in the same case as reported in the 69 Vt. 210. The defendant's claim that the case presented by the exceptions is not within that holding is not sustainable, as will sufficiently appear from a comparison of the cases.

The defendant was not entitled to a compliance with his third request as drawn, nor to more of the instruction asked than was given. It was not true that the plaintiff

could not have recovered, if it were found that the defendant read the policy to him. There can be an actionable deceit concerning a technical writing whose terms are made known. Bigelow on Fraud, 507; *Calkins* v. *The State*, 13 Wis. 389. The further charge upon the subject, which is criticised in the brief, was not excepted to.

Judgment affirmed.

JOSEPH RANCHAU *vs.* THE RUTLAND RAILROAD CO.

October Term, 1898.

Present: ROSS, C. J., ROWELL, MUNSON, and THOMPSON, JJ.

Opinion filed January 12, 1899.

Carrier—Variance—Baggage.—An allegation that the defendant as common carrier received and undertook to safely carry and deliver for hire a box containing specified articles, is sufficient to admit proof of receipt of such property by the carrier as a part of the baggage of the plaintiff in consideration of his purchase of a ticket for himself and family.

Evidence—Personal Knowledge.—A question is presumed to have called for the witness's own knowledge, and the answer to have been given upon the same basis.

Exception—"It Appeared."—When exceptions state that certain facts appeared, they mean that there was no controversy over their existence.

Purchaser of Ticket, when Bound by Restriction.—A purchaser of an ordinary passenger ticket has a right to assume that the railroad is acting under its general liability as a common carrier and is not bound by any attempted restriction thereof printed upon it, unless he has notice when he buys it, and not then unless the restrictions are reasonable.

Purchaser of Ticket, when Bound by Restriction.—The plaintiff, who could neither read nor write and was not informed by any one, purchased a railroad passenger ticket containing a restriction upon the liability of the carrier in respect to loss of baggage. *Held*, that he was not bound by the restriction.

Reversal for Misstatement in Argument.—It is reversible error for the

court to permit counsel to state in jury argument prejudicial matters of fact not in evidence. It it not enough that the court upon objection being made enjoins the counsel to confine himself to the facts, no correction being made by the court and no retraction by the counsel.

CASE for loss of baggage. Plea, general issue. Trial by jury, at the March term, 1898, Windham county, *Taft*, J., presiding. Verdict for the plaintiff with special findings. Judgment thereon for $158 damages and costs. The defendant excepted.

W. W. Stickney and *J. G. Sargent* for the defendant.

C. F. Robb for the plaintiff.

ROSS, C. J. (1) The declaration, in substance, alleges that the defendant, in the capacity of a common carrier, undertook, for hire, to carry safely for the plaintiff from Burlington, Vt., to Fitchburg, Mass., a box containing certain specified articles, and there to deliver it to the plaintiff; that the box was delivered to the defendant, and that it so carelessly and negligently conducted, in the premises that the box and its contents were wholly lost to the plaintiff.

Against the objection and exception of the defendant, the plaintiff was allowed to show that on the occasion specified in the declaration, he purchased a ticket for himself and family, of the defendant, from Burlington to Fitchburg, and that defendant received as a part of his baggage, and gave him a check therefor, the box named in the declaration; that he with his family rode on the ticket to Fitchburg, but that the defendant did not safely carry nor deliver to him at Fitchburg the box, nor any of its contents.

The defendant insists that this box and contents should have been described in the declaration as the baggage of the plaintiff, and without such description the testimony excepted to was not admissible. This exception is not well taken. The capacity in which the defendant was acting and its undertaking are properly set forth, and the property sufficiently described to enable it to be identified. There

was no variance between the allegations of the declaration and the proof. If the box and contents had been described as baggage, it would only have added another element for its identification. It was not necessary for that purpose. Nor was it necessary to allege that the hire for carrying the box and contents was a part of the purchase money of the plaintiff's ticket for himself and family. The defendant was also a common carrier of the box and contents, even if it had by special contract to some extent limited its common law liability as such carrier.

(2) The baggage check for the box claimed to have been lost was 17,652. The defendant improved as a witness the baggage master at the Fitchburg station, who testified that he received no baggage answering to this check; that he made search for it for some time, and then passed the matter over to another servant of the Fitchburg Railroad. Against the exception of the defendant, on cross-examination, the witness was asked if they ever found a box or any baggage called for by this check anywhere on the Fitchburg road. The inquiry was proper. On its face it did not call for anything but the personal knowledge of the witness. His answer, no, must be presumed to be upon his personal knowledge, until something further was shown. The question did not call for what he had heard from others, as contended by the defendant, nor does his answer profess to be given upon information. But if the question and answer are capable of the construction claimed by defendant, the defendant could not have been injured by its admission. It is stated in the exceptions that *it appeared* by the defendant's testimony that the baggage was examined soon after the train left Burlington, and there was no baggage upon the train corresponding with the check for the claimed lost baggage, and none received by the Fitchburg station. Hence the testimony of this witness if improperly received was no more than what the defendant conceded to be true by its own witnesses. When exceptions state that certain

facts appeared, they mean there was no controversy over the existence of such facts.

(3) The ticket sold by the defendant to the plaintiff contained a clause stating that the defendant, "in selling the ticket and checking baggage hereon . . . acts as agent, and is not responsible beyond its own line." The verdict of the jury finding that the loss occurred on the defendant's own line, renders a consideration of this clause immaterial. It also contains a clause stating, "Baggage liability of any company is limited to wearing apparel not exceeding $100 in value." The special verdict finds that the plaintiff's damages were $158, of which $143 was for wearing apparel. The defendant contends that the court erroneously, against its exception, rendered judgment for the largest sum named. This attempt of the defendant to limit its common law liability as a common carrier must be considered with reference to the other undisputed facts stated in the exceptions. It is there stated that the evidence tended to show that the plaintiff could neither read nor write; that the tickets were not read to him by any person, and that he did not know the provisions of the tickets. With this testimony in the case, the defendant was not entitled to have the court comply with its four requests: "That the plaintiff is bound by the terms of the contract set forth on his ticket; that by said contract the defendant is only liable for loss of baggage occurring on its own line; that defendant's liability is limited to wearing apparel as specified in the contract; that the defendant's liability is limited to wearing apparel not exceeding $100 in value." These requests all assume that such a contract existed between the plaintiff and defendant. This assumption was not warranted by the testimony in the case.

The defendant by its charter became a common carrier of passengers and their baggage, subject to the common law rules in regard to liability therefor. By nearly universal concurrence of decisions of courts of final resort, including

the decisions of this court, such carrier may by contract reasonably limit and vary its common law liability, except as to its own negligence. But, being by its charter and occupation subject to the common law liability, it will be held to that liability until it establishes that it has limited or varied it by a contract, express or implied, existing between it and its passenger. The ordinary passenger ticket does not profess to contain the contract by which the passenger obtains his right to carriage over the road of the carrier. It is only a receipt, or token, given by the carrier for the passenger to show to its servants and managers of its trains, that he has purchased the right to be safely carried on its trains between the stations specified. In this respect it is different from a bill of lading for the carriage of freight. Whatever is printed on passenger tickets has usually been regarded as a notice by the carrier of its desire to limit or vary its common-law liability. To effect such limitation, the carrier must show that the passenger, when he paid his money and received the ticket, did it under such circumstances that he assented to the conditions named upon the ticket. Whether such assent is established depends upon the circumstances of each case. Assent will not be presumed unless a knowledge of the proposed conditions and limitations are known by the passenger, and then much will depend upon whether they are reasonable or unreasonable. If not entirely reasonable assent will not be presumed from knowledge merely, because the carrier without such assent is under the common law liability, and has the passenger at a disadvantage. The passenger's circumstances and necessities may be such as would compel him to assent to almost any conditions or limitations. Hence, when the conditions or limitations are not entirely reasonable, it is generally held that the assent to them will not be implied from a knowledge of them; but express assent must be established. As the defendant took no exceptions to the charge on the subject of the special

findings of the jury, it is to be presumed that the court stated the law correctly in regard thereto, and that the jury found, as the plaintiff's testimony tended to show, that he had no knowledge of the conditions placed by the defendant upon his ticket at the time he purchased it. He must have had knowledge of them at the time he paid his money. When purchasing the ticket, the passenger frequently has no opportunity nor time to examine it. He has a right to understand, unless directly informed to the contrary, that the carrier's undertaking has the common-law liability. It is unreasonable to hold, if the conditions printed on the ticket come to his knowledge first after he has entered upon his journey, that he should be held to have assented thereto.

His assent may well be assumed when he knows that the carrier is selling special tickets at reduced rates, with the conditions and limitations plainly stated in the notices of the sale of such special tickets. 3 Am. and Eng. Ency. of Law, Title, Baggage, Duty to Carry, 543 and notes; Limitation of Liability, 554 and notes; 5 *Ibid*, Carriers of Passengers; Limitations of Liability, 608, 612 and notes; *Bissell* v. *N. Y. Central R. R. Co.*, 25 N. Y. 442: 82 Am. Dec. 369 and note; *Hollester* v. *Nowlen*, 19 Wend. 234: 32 Am. Dec. 455 and note; *Cole* v. *Goodwin*, 19 Wend. 251: 32 Am. Dec. 470 and note; *Newell* v. *Smith & Clark*, 49 Vt. 255; *Mann* v. *Birchard*, 40 Vt. 326; *Kimball* v. *Rut. & Burl. R. R. Co.*, 26 Vt. 247; *Farmers and Mechanics Bank* v. *Champlain Trans. Co.*, 23 Vt. 186; *Blumenthal* v. *Brainerd*, 38 Vt. 402; *Ouimit* v. *Henshaw*, 35 Vt. 605; *Thorp* v. *R. R. Co.*, 61 Vt. 378; *Gillis* v. *Telegraph Co.*, 61 Vt. 461; *Hodd* v. *Express Co.*, 52 Vt. 335; *Davis & Gay* v. *C. V. R. R. Co.*, 66 Vt. 290. In *Davis & Gay* v. *C. V. R. R. Co.*, where a bill of lading is considered, it is said in regard to notices: "Notice, unless brought distinctly to the knowledge of the consigner in such a manner that the law will imply his assent to the limitation contained in the notice, will not be considered as entering into and forming a part of the contract." The special verdict does not establish that the plaintiff had

knowledge of the conditions printed upon his ticket, and his assent thereto will not be implied. The defendant rests under the common law liability in regard to the loss of the baggage. That liability, as held in *Ouimit* v. *Henshaw*, *supra*, entitles the plaintiff to recover for the bedding lost, or for his entire loss.

(4) In the closing argument the plaintiff's counsel said: "The policy of the defendant was evidently to fight every claim; that if the defence was honest it would arbitrate . . . but, no, their policy was to fight." There was no evidence in the case that authorized the assertion of these facts. On the defendant's objection to this line of argument the court told the counsel to confine himself to a discussion of the testimony, and made no other ruling in regard to the defendant's objection, and allows exception to its action, if the matter was the subject of exception. The counsel did not proceed further in that line of argument, nor did he retract the statements quoted. The statement, if allowed to stand, was calculated to prejudice the defendant with the jury, and must have been intentionally made for that purpose. It charged the defendant with making a dishonest defence to the plaintiff's claim, as a conclusion from alleged facts, of the existence of which there was no evidence in the case. If it had been an unintentional mistake the counsel should, and would, have corrected it as soon as objection was made. The court also should have corrected this statement of facts which did not exist. Failing to do so, the defendant was entitled to an exception. As said by this court in *Cutler & Martin* v. *Skeels*, 69 Vt. 161, "It was a statement of facts that he had no right to make, and as it was permitted by the court, we regard it as an implied ruling that such argument was legitimate." Its allowance, under the circumstances, was reversible error. *Magoon* v. *Boston & Maine R. R. Co.*, 67 Vt. 196; *State* v. *Hannett*, 54 Vt. 83; *Rea* v. *Harrington*, 58 Vt. 181.

Judgment reversed and cause remanded.

GEORGE M. BEMIS *vs.* CLIFFORD G. BROWN.

October Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 12, 1899.

Burden of Proof—Question for Jury.—The defendant, acting as head clerk for the plaintiff, was entrusted with checks signed in blank to be filled and used by him for paying the bills of the store and, as the plaintiff's evidence tended to show, for no other purpose. He admitted having used some for his own purposes, but testified that for these he paid cash into the store. *Held*, that here was a fair question for the jury, the burden being upon the defendant to show payment for the checks, and that to order a verdict for the defendant was error.

ASSUMPSIT. Plea, general issue. Trial by jury at the December term, 1897, Bennington county, *Taft*, J., presiding. Verdict ordered and judgment thereon rendered for the defendant. The plaintiff excepted.

Charles S. Chase and *Barber & Darling* for the plaintiff.

Batchelder & Bates for the defendant.

ROSS, C. J. This is an action of assumpsit, in the common counts. The plaintiff's specifications are for goods, wares, merchandise, cash, credits and choses in action, belonging to the plaintiff, wrongfully appropriated by the defendant while acting as the clerk, servant or agent of the plaintiff in his store at Readsboro, Vt. Against the exception of the plaintiff, the county court, at the close of the plaintiff's evidence, directed the jury to return a verdict for the defendant.

In determining whether this action of the trial court was erroneous, this court must take as proven every fact which the plaintiff's testimony fairly had a tendency to establish. There was evidence fairly tending to establish that the defendant worked for the plaintiff in his store from June, 1894, to January, 1897; that during that time the

defendant was the plaintiff's head clerk in his store, kept his books, made most of the purchases, took charge of the cash received, and filled all or nearly all the checks given for the payment of bills; that these checks were signed by the plaintiff, from time to time, unfilled, and left with the defendant to be used only in the business of the store; that a good amount of business was done in the store at a profit —more than enough to pay all expenses, but resulted in quite a large loss. The plaintiff called the defendant to the stand and examined him quite fully. His testimony and that of the plaintiff was the main testimony in the case. It would answer no profitable end to discuss this testimony in detail, nor in its various bearings. The defendant admitted that he filled and used various of the checks signed by the plaintiff unfilled, in his own business, but claimed that he paid the money for them into the cash of the store. Treating as established, which the testimony tend to show, that the defendant had no right to fill and use any of the checks for his own use, such use was wrongful and a misappropriation of the cash deposit of the plaintiff. This would entitle the plaintiff to recover for the cash thus appropriated, unless the defendant established that he fully restored the funds thus appropriated by him. For some of the checks thus used the defendant had to rely upon his own testimony that he paid into the cash of the store, at the time he used the checks, the money with which to purchase them. The plaintiff was not bound to take the testimony of the defendant in this respect as true, nor could the court assume that the jury would find it to be true, especially when the other facts in the case, which the testimony tended to establish, are considered.

The defendant's account of where and how he obtained the money to pay for these checks was neither clear nor conclusive. While the plaintiff gave no direct proof of any other specific misappropriation of his property by the defendant, that had not been fully accounted for, there were facts and circumstances which the

evidence tended to establish, from which the jury might find misappropriations by the defendant other than the checks used by him. In regard to whether the defendant paid for these checks in cash at the time he filled and used them about his own business the plaintiff clearly had the right to go to the jury. The testimony is quite voluminous and would demand careful study and consideration to determine the specific claims, aside from these checks, on which the the plaintiff had the right to go to the jury. It is to be presumed the counsel will so present the testimony on a re-trial that such points will be clearly developed and presented.

Judgment reversed and cause remanded.

W. H. PRESTON, assignee, *vs.* RUSSELL, FOLLENSBY & Co.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed January 12, 1899.

Insolvency—Preference—Equitable Assignment.—The plaintiff assignee seeks to recover under V. S. 2141 certain payments made by his insolvent to the defendants. The defendants, who were lumber merchants, furnished the insolvent, who was a builder, with lumber to be used in erecting a house for Brooks Brothers under an arrangement with the insolvent that he should give them orders on Brooks Brothers for their pay. Brooks Brothers were notified and promised to pay the order if and so far as they might be owing the insolvent when the orders should be given. The arrangement was concluded more than four months before the petition was filed. The lumber having been furnished, the orders were accordingly given and paid within the four months, with full knowledge of insolvency, and, as the court found, for the purpose of giving and receiving a preference and in fraud of the laws relating to insolvency. *Held*, that the arrangement amounted to a valid and enforcible assignment of the fund to be created by the lumber of the defendants and the labor of

the insolvent, that the giving and paying of the orders were merely in fulfillment of the obligation, and related back to it, and did not constitute a preference.

ASSUMPSIT. Trial by court, at the June term, 1898, Caledonia County, *Munson*, J., presiding. Judgment for the plaintiff for $900.00 with interest from May 1, 1895. The defendants excepted.

The finding of the court upon the subject of the arrangement between the insolvent, the defendants and Brooks Brothers, relating to the furnishing of the lumber and the giving and payment of orders, is in the following language: "In the fall of 1894, as early as November 1st, Lachance took a contract to furnish the material and build a house for Brooks Brothers to cost about $3500, and told the defendants of his taking the contract and that he should want some lumber; and the defendants, believing that his financial condition was becoming worse, decided not to go on in the old way; and Follensby, by direction of the firm, saw Lachance and told him they would be glad to furnish him the lumber, but they should want him to give orders on Brooks Brothers instead of notes, and Lachance replied that he would rather do that than give notes, and Follensby said he would see the Brooks Brothers about it; and Follensby then saw Jonas Brooks, one of the brothers, and inquired whether any orders Lachance gave them on Brooks Brothers would be taken care of, and Brooks replied that if they were owing Lachance the amount of the order they would make them good; after which, and before the delivery of the lumber, Follensby saw Lachance and told him what Brooks had said."

Bates, May & Simonds for the defendants.

W. P. Stafford and *Harry Blodgett* for the plaintiff.

ROSS, C. J. The plaintiff, assignee of the insolvent's estate, seeks to recover $900 paid by the insolvent within four months before filing the petition to have him adjudged to be

an insolvent, to the defendants, under the following circumstances. The insolvent was a carpenter, and builder and the defendants were manufacturers and dealers in lumber. He had purchased the lumber for his building operations, for some time, of the defendants. In the fall of 1894, the insolvent was indebted to the defendants for lumber furnished, was, in fact, insolvent, and was believed to be insolvent by the defendants. Previously to this time, the defendants had sold him lumber, from time to time, as needed by him in execution of his building contracts, and taken notes from him payable at a bank of which one of the defendants was a director. These notes were sometimes paid when due, but often had to be renewed. In the fall of 1894, this director believed that the insolvent was in failing circumstances, and objected to giving him farther credit. The insolvent then took a contract to build a house for Brooks Brothers, to cost about $3500. Brooks Brothers were responsible financially. The insolvent applied to the defendants to furnish him with lumber for this house. The parties had negotiations, which resulted in the defendants agreeing to furnish the insolvent the lumber necessary to build the house, to be paid for by Brooks Brothers on orders, given by the insolvent, which orders Brooks Brothers agreed to honor so far as they should be owing the insolvent on the contract at the time the orders should be given. This agreement was concluded in November, 1894, more than four months before the insolvency petition was filed. Within the following four months, but the exact dates are not found, the defendants furnished the insolvent about $1000 worth of lumber for the house, and the same was paid for agreeably to the agreement of the parties, by Brooks Brothers, on two orders given the defendants by the insolvent. One order was for $500, drawn and paid the first of January, 1895, and the other for $400, drawn and paid the last of February, 1895.

The contention is, whether, under the insolvent law in

regard to payments made in fraud of it, the assignee is entitled to recover this amount from the defendants. The section of the statute relating to this subject is 2141, which reads: "If a person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to a creditor or a person having a claim against him, or who is under a liability for him . . . . . makes a payment . . . . . either directly or indirectly, absolutely or conditionally, the person receiving such payment . . . . . having reasonable cause to believe such person insolvent, or in contemplation of insolvency, and that such payment . . . . . is made in fraud of the law relating to insolvency, the same shall be held void, and the assignee may recover the property, or value thereof, from the person so receiving or to be benefited thereby." It is observable that this section does not prohibit all dealing with a person known to be insolvent, or in contemplation of insolvency, nor does it prohibit receiving payments from him. It does prohibit all such dealings, or receipt of payments, as are made in fraud of the laws relating to insolvency. The controlling principle of such laws is, to secure a ratable distribution of the insolvent's property among his then existing creditors. Payment of a fully secured debt, on surrender of the security, is not prohibited, nor a sale of the insolvent's property with or without payment therefor; nor a fair exchange of property by him; nor a borrowing of money and giving security therefor; nor any fair dealing by the insolvent with his property, unless it operates to defeat a ratable distribution of his property among his then existing creditors. *Morey* v. *Milliken*, 86 Me. 481; *Williams* v. *Coggeshall*, 11 Cush. 442; *Tiffany* v. *Boatman's Institution*, 18 Wallace 375; *Dalrymple* v. *Hillenbrand*, 62 N. Y. 5; *Ex parte Ames in re McKay and Aldus*, 7 Nat. B. R. 564; *Bush* v. *Boutelle*, 156 Mass. 167: 32 Am. St. 442 and note; *Stevens* v. *Blanchard*, 3 Cush. 169. Many more like

decisions could be added. On these principles, when this agreement was entered into, the defendants could have sold the insolvent lumber for the house, and the insolvent could have gone to Brooks Brothers and have gotten the money, and have paid for such lumber when and as delivered, because such transactions would not have been in fraud of the laws relating to insolvency. It would have been no more than an exchange of lumber delivered by the defendants, to create a fund in Brooks Brothers' hands, for money taken from the fund so created. Was the agreement made and carried into execution any more than this? The defendants, when applied to to furnish the lumber to enable the insolvent to erect the house, refused to let him have it on his own credit. They proposed that it should be paid for, on orders, by Brooks Brothers for the erection of whose house the lumber was to be furnished. This the insolvent assented to, and thereby agreed that the lumber so furnished should be paid for from the fund to be thereby created in Brooks Brothers' hands. He was not bound to pay for it in any other manner, if he tendered payment in this manner, nor could the defendants, on such tender being made, have enforced payment in any other manner. By the agreement the insolvent not only bound himself to give such orders, but impliedly agreed there should be funds in Brooks Brothers' hands to answer them. Otherwise such orders would not operate as payments for the lumber. Nor was this the whole of the agreement. Brooks Brothers became party to it and became bound to make the payments, if the orders were given and funds remained in their hands.

If therefore the defendants and the insolvent performed their respective parts of the agreement, Brooks Brothers became obligated to make the payments which they did make to these defendants. The defendants and insolvent, respectively, performed their parts of the agreement, and thereby Brooks Brothers became obligated to make the payments sought to be recovered, and such payments were

made by Brooks Brothers in discharge of their obligation, and received by the defendant as coming from Brooks Brothers under the agreement. Under it the defendant's lumber, through the insolvent, as an intermediate party, was to, and did, go into the erection of the house for Brooks Brothers and thereby create a fund in their hands out of which Brooks Brothers were to and did pay the defendants in discharge of the obligation of themselves and of the insolvent. By the agreement, none of the insolvent's property then in existence was to be used to pay for the defendants' lumber, nor does it appear that the insolvent contracted a debt, proved or provable against his estate, in the erection of the house. The sale of this lumber was not on the credit of the insolvent, but on the credit of Brooks Brothers, who were known to the defendants to be financially responsible. It is found, "the lumber would not have been delivered but for the arrangement stated." Hence, on the facts found, the payments sought to be recovered were made by Brooks Brothers in discharge of the obligation assumed by them when the contract for the purchase of the lumber was entered into. This was more than four months before the insolvency proceedings were commenced, and the contract was not in fraud of the laws relating to insolvency. It did not, and could not, reduce the insolvent's then means available for the payment of his then existing debts, but, if successful, might add thereto, at least to the extent the insolvent's personal labor and skill entered into the erection of the house. Such contract, although not in writing, was good between the parties—*Noyes* v. *Brown*, et al. 33 Vt. 431—and operated, at its date, to assign equitably, at least, to the defendants, so much of the contract price for the erection of the house as might be required to pay for the lumber. *Blin* v. *Pierce*, 20 Vt. 25. Equity regards and treats that as done which in good conscience ought to be done. 1 Pomeroy's Eq. Jur. § 364. In *Blin* v. *Pierce*, it is held that a debt equitably assigned, in good faith, more

than four months before the commencement of proceedings in bankruptcy, is protected to the assignee against such proceedings. Under that decision, if the debt from Brooks Brothers had been due absolutely, the agreement between these parties would have been a valid assignment, at law, of so much of the contract price as should be required to pay the defendants. The agreement operated to make the equitable assignment, and not the orders subsequently given by the insolvent. The lumber was sold and delivered on the strength of the agreement. The fund, potentially existing, by reason of the agreement, in Brooks Brothers' hands, so far as necessary, was appropriated to payment for the lumber. The orders were required to make certain the sum so appropriated. When the contract was made, the sum required to pay for the necessary lumber was not ascertained and could not well be except as the work on the house progressed. No particular form of words is necessary to make an equitable assignment. The intention of the parties to the agreement, gathered from the language used, read in the light of existing circumstances, controls, as in all agreements. Many cases and works of elementary writers might be cited illustrative of the doctrine of equitable assignments. The general principles governing such assignments are well expressed by *Green*, V. C., in the opinion in *Bank* v. *Bayonne*, 48 N. J. Eq. 246, found in a note to *McDaniels* v. *Maxwell*, 28 Am. St. 745. He says:—

"It is settled that an assignment, for a valuable consideration, of a sum of money due or to grow due on the performance of an existing contract, will, on notice thereof being given to the debtor, operate at once, or when the fund is created, as an equitable assignment of so much of the fund as is covered thereby, subject to all valid prior charges. *Superintendent of Schools* v. *Heath*, 15 N. J. Eq. 22; *Shannon* v. *Mayor*, 37 N. J. Eq. 123; *Kirtland* v. *Moore*, 40 N. J. Eq. 106; *Brokaw* v. *Brokaw*, 41 N. J. Eq. 304; *Lauer* v. *Dunn*, 115 N. Y. 405; 3 Pomeroy's Eq. Jur. § 1280. While,

properly speaking, an assignment cannot be made of a subject which does not exist, such as a fund to become due on the future performance of a subsisting contract, yet equity, on the possible debt ripening into an enforceable specific money liability, treats the agreement as an assignment, *pro tanto*, of the fund, and by force thereof vests the equitable title to the money in the assignee. *Field* v. *Mayor* 6 N. Y. 179: 57 Am. Dec. 435 and note; *Hall* v. *Buffalo*, 1 Keyes 193; *Brill* v. *Tuttle*, 81 N. Y. 454, 457: 37 Am. Rep. 515; *Brown* v. *Dunn*, 50 N. J. L. 111, 113; 3 Pomeroy's Eq. Jur. §§ 1280, 1283, note 2. To impound the amount in the hands of the debtor, notice of the assignment must be given to him; but no particular form of notice is required. Any writing or act which clearly indicates that the assignor intends to make over the fund belonging to him amounts in equity to an assignment of the fund. *Bower* v. *Hadden Blue Stone Co.*, 30 N. J. Eq. 171; *Lyon* v. *Bower*, 30 N. J. Eq. 340; *Shannon* v. *Mayor*, 37 N. J. Eq. 123. On notice being given to the debtor, and the sums being earned under the contract, the debtor becomes trustee, or *quasi* trustee, for the assignee, as to the amount assigned, subject to existing equities and valid prior charges thereon. *Hall* v. *Buffalo*, 1 Keyes 193. From this it follows that neither payment to, nor a release or discharge by, the assignor, after notice of the assignment, can affect the rights of the assignee against the debtor. *Jones* v. *Farrell*, 1 De G. & T. 208; *Brill* v. *Tuttle*, 81 N. Y. 454: 37 Am. Rep. 515; *Field* v. *Mayor*, 6 N. Y. 179: 57 Am. Dec. 435; *North Bergen* v. *Eager*, 41 N. J. L. 184; 2 Pomeroy's Eq. Jur. § 704. It is evident from this statement of the incidents of an equitable assignment, that acceptance by the debtor of the order or assignment is not, in equity, necessary to the validity as a transfer, *pro tanto*, of a fund in his hands. It takes effect from the acts of the assignor and assignee, and the debtor, so far as the right to the fund is concerned, is but the instrument through whom the transfer

is to be actually made. The debtor's acceptance or promise gives the assignee an action of law against him, not on the assignment, but on the promise; in equity it neither creates, increases, or diminishes his liability to the assignee. 3 Pomeroy's Eq. Jur. § 1280 and note 1."

On these principles, as the lumber was delivered from time to time under the contract, not only was the fund in Brooks Brothers' hand increased to the extent of its value, but to that extent the fund became thereupon equitably the property of the defendants, and never the property of the insolvent. If the insolvent had refused or neglected to give the orders, equity would have seized so much of the fund in Brooks Brothers' hands as had thus been appropriated to payment for the lumber, and applied it to that end, without the orders. The defendants, also, at law, could have enforced payment, on the promise of Brooks Brothers. While the doctrine of equitable assignment has not been so fully stated in any of our decided cases, so far as I am aware, it has been frequently applied, and always in harmony with the doctrine stated. *Claflin* v. *Kimball*, 52 Vt. 6; *Hutchins* v. *Watts*, 35 Vt. 360; *Webster* v. *Moranville*, 30 Vt. 701; *Downer* v. *Marsh*, 28 Vt. 558; *Thayer* v. *Kelley*, 28 Vt. 19; *Spafford* v. *Page*, 15 Vt. 490; *Upton* v. *Moore*, 44 Vt. 552; *Bank* v. *Post*, 65 Vt. 222; *Trow* v. *Braley*, 56 Vt. 560; *Wescott* v. *Potter*, 40 Vt. 271; *Strong* v. *Strong*, 2 Aik. 373; *Lampson* v. *Fletcher*, 1 Vt. 168. See also, Subject, Assignments, 2 Am. & Eng. Ency. of Law (2d ed.) pp. 1017, 1026, 1031, 1055, 1056, 1060.

Judgment reversed, and judgment for defendants to recover their costs.

E. HENRY POWELL, special admr., *vs.* CATHERINE A. FOSTER'S ESTATE.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, and THOMPSON, JJ.

Opinion filed January 12, 1899.

Administrator's Fees—Agreement.—It is competent for all parties interested in an estate to agree with a proposed administrator that if he will accept the appointment he shall not be limited, in his charges for services, to the statutory fees.

Administrator's Fees—Agreement.—Such an agreement means that he shall receive reasonable compensation, and it may be enforced by the probate court upon the settlement of the administrator's account.

Administrator's Fees—V. S. 5384.—Our statute fixing the administrator's *per diem* expressly authorizes a larger payment in cases of unusual difficulty and responsibility, and is thus distinguishable from statutes prohibiting the receipt by certain officers of more than statutory fees.

Special Administrator's Lien for Fees.—A special administrator holds the estate in trust for whomsoever is entitled to it, and is himself entitled to be compensated from the fund.

Administrator's Fees Charged in Gross. — An administrator may be allowed such a sum for services as is found reasonable, although charged in gross, and although there be no express finding that the matters involved were of unusual difficulty or responsibility.

Administrator's Fees—Services in Another State.—He may also be allowed for services in looking after lands in another state which came to him through settlement, especially when he acts upon the request of all interested.

Administrator Need Not Act as His Own Attorney at Law. — An administrator, although an attorney at law, is not bound to act as such even in his own defense, but may employ counsel.

Administrator May Rely on Advice of Legal Counsel. — Expenses in litigation, incurred by an administrator in good faith upon the advice of eminent counsel, cannot be disallowed because they were in fact unnecessary and the counsel mentally unsound.

Administrator Must Act with Prudence. — But the employment of an attorney at law at $10 per day to serve a notice, which might be done as well by a common officer, is not to be allowed on the mere finding of good faith, but requires the additional finding of prudence.

APPEAL from probate. Heard upon the report of a commissioner, at the September term, 1897, Franklin county, *Munson*, J., presiding. The plaintiff's exceptions to the report were sustained, those of the defendant overruled, and judgment was rendered for the plaintiff for $1,710.77. The defendant excepted.

As to the item of $34 paid to A. K. Brown, the commissioner found that the plaintiff deemed it necessary to have personal service made, upon all the heirs, of a petition brought by him for a partial distribution of the estate of George W. Foster, and employed said Brown as a special messenger to obtain their acceptance of service; that in doing so the plaintiff acted in good faith and as he believed for the best interest of the estate. Catherine Foster's estate consisted simply of her interest in the George W. Foster estate.

As to the item of $45, it was found that the estate of Catherine A. Foster was interested in a quarter-section of land in Iowa in possession of a tenant who refused to pay the rent, and at the request of those interested the plaintiff, on a business trip West, left the line of his route and examined the land in question and the law of Iowa as to the title, and that in this matter the plaintiff exercised his best judgment, and that the charge was reasonable.

As to the interpleader, it was found that the contest over the will of Catherine A. Foster lasted nearly five years, and that after the allowance of the will and the qualification of the executors, the plaintiff filed his account, from the allowance of which the executors appealed; that at about the time of this settlement suits were brought against the executors and the plaintiff was summoned as their trustee; that thereupon the plaintiff, being desirous of relief from the trust and from the trouble of litigation, consulted a lawyer of eminence, by whom he was advised to bring a bill of interpleader against the executors and the plaintiffs in that suit, which was accordingly done; but said bill was

dismissed upon demurrer. It was conceded that the bill of interpleader was unnecessary and would not have been advised by the counsel except for the state of mental disability in which he then was; that the plaintiff acted in good faith and as he believed under competent advice.

J. Noble Hayes and *Joel C. Baker* for the defendant.

Wilson & Hall for the plaintiff.

Ross, C. J. While the controversy over the establishment of the will of Catherine Foster was pending, the plaintiff was selected for appointment as special administrator of her estate "by all the parties in interest . . . because he resided away from the place of contest, and on account of his large business experience and his ability to furnish the bond required." For the five years during which that controversy was being carried on, the commissioner has found that he, "so far as appeared, managed the property in his hands profitably and to the satisfaction of all interested." When the controversy over the will was ended, the will established, and the executors appointed, the plaintiff presented and had allowed by the probate court his administration account, From this allowance the executors appealed, mainly, because they claimed that he had overcharged for his services. For these years he had charged, and was allowed, $150 per year, or $750. By V. S. 5384, the probate court is authorized to allow him two dollars for each day he was employed on the business of his appointment, and, "in cases of unusual difficulty or responsibility, such further sum as it judges reasonable." The plaintiff's account does not profess to show the number of days he was employed in the matters of his appointment, and the commissioner makes no report in regard to the number of days he was so employed, nor does he report that his employment involved matters of unusual difficulty and responsibility. Instead, the commissioner reports, "I find that it was not expected, nor understood, at the time

plaintiff was appointed as special administrator that he was to serve for the *per diem* allowed by statute, but that he was to receive reasonable compensation for his services." The appellant contends that this only finds that the plaintiff so understood. We do not think that this is the fair construction of this finding of the commissioner. He says this was the expectation and understanding at the time of his appointment. He was selected and his appointment procured by all interested in the estate. The fair construction of this finding is, that such was the expectation and understanding of all interested in the appointment, or of the plaintiff and of all parties interested in the estate. That this is the construction to be placed on this finding is further manifest from the fact that the commissioner settles the allowance for the plaintiff's services upon this basis alone; and from the further fact, that it does not appear that he was requested by the appellant to settle it upon any other basis.

It objected to these charges on the ground that they were *exorbitant*, because his services were not of unusual difficulty or responsibility. This objection the commissioner answers by stating briefly what services he performed, and finding that the plaintiff's charge therefor is not "unreasonable or exorbitant, and therefore allows the same as charged." For the services of the plaintiff performed after the appeal was taken, the commissioner disallows one hundred dollars of his charges because he considered them unreasonable considering the amount and character of the services.

The defendant further contends that all interested in the estate could not, by agreement with the plaintiff, authorize the probate court, nor the appellate probate court, to allow the plaintiff for services on any other basis than that prescribed by statute. The statute does not, as in the case of a sheriff and some other officers, prohibit the receiving of greater fees. It provides what

they shall be in cases where there is no agreement. In authorizing a further discretionary allowance in cases of unusual difficulty or responsibility the statute, in terms, permits the probate court to allow beyond the *per diem* in such cases, "such further sum as it judges reasonable;" hence it permits all parties interested in the estate, when they desire the appointment of a man of large business experience, to agree with him that he shall be reasonably compensated for his services. By reasonable compensation is meant such as will fairly compensate when the character, effectiveness and ability entering into the service are considered. Such agreement, when reasonable, is allowed between a trustee and the *cestuis que trust*. *Bowker* v. *Pierce*, 130 Mass. 262. If such agreements are unreasonable in amount, or number of persons employed, they will be disregarded. *Barney* v. *Griffin*, 2 N. Y. 372. In *Hubbell* v. *Olmstead*, 36 Vt. 619, this court upheld and enforced an agreement for payment beyond the statutory fees for this class of services against the party who entered into the agreement. It is contended that this decision does not authorize the probate court to enforce such an agreement in the settlement of the administration account. There is no apparent reason why it should not, when, as in this case, it is only for reasonable compensation, and all parties interested in the estate have entered into it with the executor or administrator. That the charge is a gross sum per year is no reason why it should be disallowed if its reasonableness is established. It may well require the trier to be more careful, and to place upon the plaintiff the burden of fully establishing the reasonableness of his charges. *Evarts* v. *Nason's Est.*, 11 Vt. 127; *Admr. of Merrill* v. *True*, 28 Vt. 676. The plaintiff, as special administrator, held the estate in trust for whomsoever might be found legally entitled to it. As such trustee, he had the right to be compensated for his services out of the fund. Hence the court administering the fund had the right to

compensate him from it. *Hubbard* v. *Fisher*, 25 Vt. 539. While the precise question now under consideration is not discussed in *Foster's Executrix* v. *Stone, Admr.*, 67 Vt. 336, the services there allowed for were charged in gross, and allowed for because found to be reasonable. This decision permits the probate court in the settlement of the account of a special administrator to allow against the estate such a sum for his services as is found to be reasonable, although charged in gross, and there is no finding that they were of unusual difficulty or responsibility, and no finding of the number of days which was required for their performance. It is also full authority for the allowance of the $45 for time and expenses in looking after lands in Iowa. These lands came to the estate through his settlement with the estate of George W. Foster, and his services were performed at the request of all parties interested, although in another state. Considering that they came to the estate in his charge through a settlement effected by him, it may be questionable whether it was not his duty to care for them without any request from the parties interested in the estate.

The expenses in the bill of interpleader, allowed for, were incurred in good faith on the advice of an attorney of eminent ability, and without knowledge that he was afflicted with any mental disability. It is true they were unnecessary; that the plaintiff could have fully protected himself in the trustee suits; yet under the facts found they were properly allowed under the decision in *Foster, ex.*, v. *Stone, admr.* By the appeal the defendant estate made the employment of some attorney necessary to protect the plaintiff's interests. Although the plaintiff was an attorney it was not his duty as special administrator to act as such even in his own defence. The charges of Wilson & Hall having been found reasonable, we think, were properly allowed. The commissioner has not allowed the plaintiff for any services in connection with this suit, and such

expenses were rendered necessary by the appeal by executors. It is to be presumed that the court in taxing the costs, which are discretionary, will see to it that no costs are allowed which would duplicate any part of this allowance for the services of Wilson & Hall.

The allowance for the item to A. K. Brown does not fall within any well-recognized principle. It is found that, in employing Brown, the plaintiff acted in good faith, in what he believed to be for the best interest of the estate of Catherine Foster. This lacks the essential element that the plaintiff acted therein with prudence. The character of the service to be performed, giving notice to heirs of the pendency of the petition, was such that it could have been performed by any sheriff or officer authorized to make such service, on payment of legal fees. Nothing is disclosed which rendered it prudent to employ an attorney, at the rate of ten dollars per day and expenses, to give such notice. There is no finding that shows how much of this expense would have been incurred if the plaintiff had acted in good faith and with prudence. On the facts reported this item was erroneously allowed. As the item is not large, we do not recommit the case, but disallow the same.

Judgment reversed, and judgment for the sum found by the county court increased by $34, with interest. As the costs are discretionary and as neither party sustains his contentions, no costs are allowed in this court. Judgment to be certified to probate court.

Taft, J., dissents.

LAURA J. LAVIGNE *vs.* PATRICK LEE.

October Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON and START, JJ.

Opinion filed January 12, 1899.

Evidence—Self-serving Declarations.—The defendant was asked on cross-examination whether he had not on all occasions before the trial in the city court denied a certain material fact which he now admitted. He answered that he had denied it to two persons named and possibly to others, but not to all with whom he had conversed about it. The plaintiff then introduced other witnesses who testified to the defendant's having made the denial to them also. Thereupon the defendant was permitted to show that to certain other persons he had admitted the fact as he was now admitting it. *Held*, error, as not within any exception to the rule which excludes self-serving declarations.

TRESPASS. Appeal from the city court of Burlington to the county court for Chittenden county. Trial by jury, at the March term, 1898, *Thompson*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

C. J. Ferguson and *R. E. Brown* for the plaintiff.

H. F. Wolcott and *V. A. Bullard* for the defendant.

Ross, C. J. The plaintiff testified, and gave other evidence tending to establish, that the defendant visited her on the evenings of May 23 and 29, 1897, and on the latter occasion made an assault upon her. The defendant testified to having made the visits, on the dates named, but denied having made an assault. On cross-examination, the defendant was asked, if up to the trial in the city court he had not told various parties that he had been at the plaintiff's only once. He replied that he had told two persons, named by him, and perhaps others, that he visited her but once. He at first denied, and afterwards insisted that he did not think he had so told all persons he talked

with about it, up to the time of trial in the city court, but would not swear positively that he had not so claimed.

The plaintiff's evidence tended to show that about the time of the trial in the city court the defendant learned that she could prove by witnesses, other than herself, that he was at her house on the evening of the alleged assault, and that until he learned this he had denied being there on that occasion, to various persons. This testimony, and the admissions drawn out of him on cross-examination, could serve no other purpose than to impeach the credibility of the defendant. It was not to obtain an admission to be used as direct evidence that he was not there on May 29th. That fact was not in controversy. In this portion of the testimony, the defendant's counsel claimed the right, and was given it, at the peril of the defendant, against the exception of the plaintiff and the judgment of the trial judge, in re-examination, to draw out of the defendant that he told the sheriff and his counsel immediately after the service of the writ upon him, and before the trial in the city court, that he was at the plaintiff's on both dates; that his counsel advised him to tell the truth about it. Against the like exception, he was allowed to show by the sheriff who served the writ, that defendant then told him that he was there upon both dates. This was error. The general rule is that evidence that the witness has, on other occasions, made statements similar to what he has testified to in the cause, is not admissible. There is an exception to this rule. 2 Green. Ev. § 469. *State* v. *Flint*, 60 Vt. 316. The evidence admitted in this case does not come within the exception, but is within the general rule.

The exception is, "If an attempt is made to discredit the witness on the ground that his testimony is given under the influence of some motive prompting him to make a *false and colored statement*, the party calling him has been allowed to show in reply, that the witness made similar declarations at a time when the imputed motive did not exist." *State* v.

Flint, supra. The parties agreed that the defendant's testimony as given was true. On his cross examination, he admitted that on several occasions, out of court, he had made statements contradictory of his testimony. That he also sometimes made statements out of court similar to what he had testified to, had no tendency to rebut the contradictory statements which he admitted, nor could it be received to corroborate his testimony as given, whatever the motive might be that influenced him to give the testimony, as the truth of his testimony given was not in controversy and needed no corroboration. Therefore, the testimony excepted to, in any view, was irrelevant and inadmissible.

The plaintiff contends that if this testimony was erroneously received, the error was harmless. It is not apparent that it might not have iufluenced the jury to the prejudice of the defendant.

Judgment reversed and cause remanded.

EDWARD I. BAKER, receiver, *vs.* SPAULDING BROTHERS.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Insurance—Foreign, Unlicensed Company—Business at Home Office Permitted.—Although V. S. 4181 prohibits foreign companies from doing business in this State without a license, V. S. 4182 permits residents of this State to procure insurance at the home office of any foreign company, and what they may do by themselves they may do by their agents. Therefore, the plaintiff's company did not violate the statute by accepting in Boston the defendants' application, received from the defendants agent in Vermont, and sending the policy by mail to such agent there with a request that he collect the premium.

Agent of Insured.—The defendants having expressly agreed with Switser, who sent in the application and received the policy, that he should act as their agent in the transaction, he was, throughout, their agent, although he had been requested by the company to give them any insurance he could not place in his own companies and the policy was sent to him with a request that he should collect the premium, which he did.

A Massachusetts Contract.—The contract of insurance took effect when the policy was deposited in the post office in Boston, and was a Massachusetts contract.

Assessment Regular, and Enforcible Here.—The assessment, as shown by the records of the company, being in substantial compliance with the Massachusetts statute, and nothing appearing to the contrary, is enforcible in this State.

ACTION to recover an insurance assessment. Trial by court, at the June term, 1898, Caledonia county, *Munson*, J. presiding. Judgment for the plaintiff. The defendant excepted.

Farnham & Porter for the defendants.

There was not sufficient proof of a legal assessment. The assessment could only be made upon those who were members at the time of the loss. *Long Pond Ins. Co.* v. *Houghton*, 6 Gray 77; *Manlove* v. *Bender*, 39 Ind. 371: 13 Am. Rep. 280; *Insurance Company* v. *Fuller*, 14 Barb. 373; *Wilson* v. *Insurance Company*, 19 Pa. 372; *Coston* v. *Insurance Company*, 1 Pa. 322; *Insurance Company* v. *Marietta Factory*, 3 Ohio 348; May on Insurance, 693; *Insurance Company* v. *Fitzpatrick*, 2 Gray 279.

The plaintiff cannot recover, for the company never was licensed to do business in this State. *Insurance Company* v. *Wright*, 55 Vt. 526; 60 Vt. 515.

Notwithstanding what was said between Switser and the defendants, Switser acted as the agent of the company and should be treated in law as the company's agent. It is not what the parties stated but what they did, that should determine the question of agency. *Arthurholt* v. *Insurance Company*, 159 Pa. 1: 28 Atl. 197; *Insurance Company* v. *Young*, 111 Mass. 537; *Hartford Insurance Company* v. *Reynolds*, 36 Mich. 502; *Mayo* v. *Pew*, 101 Mass. 556;

Crousillat v. *Ball*, 3 Yeates, (Pa.) 375: 2 Am. Dec. 375; 2 Am. & Eng. Ency. of Law 595; *Mullin* v. *Insurance Company*, 58 Vt. 114: V. S. 4201; *Kister* v. *Insurance Company*, 5 L. R. A. 646; *People* v. *People's Insurance Exchange*, 2 L. A. R. 341.

The contract was not consummated until delivery of the policy by Switser, and that being delivered in Vermont characterized the transaction as a Vermont contract. *Ford* v. *Insurance Company*, 6 Bush. 133: 99 Am. Dec. 663 and notes; *Thwing* v. *Insurance Company*, 111 Mass. 93; *Shattuck* v. *Insurance Company*, 4 Clif. 598; *Cromwell* v. *Insurance Company*, 49 Md. 366; *Heebner* v. *Insurance Company*, 10 Gray, 131; *State* v. *O'Neil*, 58 Vt. 140; May on Insurance, 412; *Porter* v. *Insurance Company*, 70 Vt. 504.

Bates, May & Simonds and *H. B. Howe* for the plaintiff.

START, J. The plaintiff, as receiver of the Continental Mutual Fire Insurance Company of Boston, Massachusetts, seeks to recover an assessment made against the defendants, who were insured under the following circumstances: Francis Switser was an insurance agent at St. Johnsbury, doing business for several foreign companies authorized to do business in this State. In the course of his business he received letters from other companies asking him to give them any insurance he could not place in his own companies. Among these companies was the Continental, which was not authorized to do business in this State. Switser had for some time carried the insurance of the defendants. A policy was cancelled, and Switser was unable to place it with any of his companies, and so informed the defendants, telling them he could put them in the Continental, but that the company was not authorized to do business in this State, and he should have to act as their agent in the matter; and the business proceeded under that understanding. Switser made out an application, had it signed by the defendants, and mailed it to the company. The

company accepted the application, issued the policy, and mailed it to Switser with a request that he collect the premium, and Switser delivered the policy to the defendants. There was a loss under the policy, which was paid.

The defendants insist that the company, in issuing and delivering the policy under these circumstances, was transacting insurance business in this State contrary to V. S. 4181, and that for this reason payment of the assessment cannot be enforced in this State. But we think the transaction was a procuring of insurance at the home office of the company, and was permissible under V. S. 4182, which authorizes the insurance commissioners, under certain conditions, to license foreign companies to do insurance business in this State by licensed resident agents, and provides that its provisions shall not be construed to prohibit residents of this State from procuring insurance at the home office of any foreign company. Such contracts are excepted from the prohibition against foreign insurance companies doing business in this State without a license, and are clearly enforceable in this State. The defendants knew that the company was not authorized to transact insurance business in this State. Knowing this, they proceeded to procure insurance at the home office of the company, and under the findings it must be held that they made Switser their agent to procure such insurance. He wrote their application and sent it to the company, and the company accepted the application, issued its policy and mailed it from its home office in Boston to Switser, with the request that he collect the premium. There was no condition attached to the delivery and nothing to indicate that the policy was not to be operative and binding from its date, or from the date of the application; and the delivery thus made was a delivery of the policy to the defendants in Boston. The delivery thus made must be regarded the same, in law, as it would have been had the application been sent by the defendants personally, and the policy mailed to

them with a request to pay the premium. The contract took effect when the policy was deposited in the post office in Boston, was a Massachusetts contract and governed by the laws of that state.

Hartford S. B. I. & Ins. Co. v. *Lasher Stocking Co.*, 66 Vt. 439, was an action to recover an insurance premium. The application was made at the solicitation of a special agent of the plaintiff, and was delivered to the agent in this State and by him transmitted to the branch office of the plaintiff in New York. The plaintiff deposited in the mail in New York city an envelope containing the policy of insurance in accordance with the terms of the application, and the same was duly received by the defendant. It was held that the contract took effect when the policy was deposited in the post office in New York, was a New York contract and governed by the laws of that state.

Hyde, Receiver, v. *Goodnow*, 3 N. Y. 266, was an action to recover a premium note. The company's agent received from a resident of Ohio an application for insurance and transmitted it to the office of the company in New York, where it was approved and a policy issued and transmitted to the defendant by mail. It was held that the contract was made in New York, and, therefore, that the contract was not within the prohibition of the statute of Ohio, declaring that "no policy of insurance shall be signed, issued or delivered" in that state by a company not chartered by the laws thereof, except by the agent of such company, who should first have obtained a license in the manner prescribed by the act.

In *Western* v. *Insurance Co.*, 12 N. Y. 258, the application was made in Canada and there delivered to the mutual agent of the parties and by him sent to the company in New York. The application was there accepted, a policy issued and sent to the mutual agent of the parties in Canada to be delivered to the applicant; and it was there delivered to him. It was held that the contract of insurance was made

in New York, was there to be performed, and its validity depended upon its laws.

The statute of Massachusetts, § 47, chapter 522, Acts of 1894, which was found authentic by the court below, provides as follows: "Whenever a mutual fire insurance company is not possessed of cash funds above its insurance reserve, sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor, in proportion to their several liability. The company shall cause to be recorded in a book kept for that purpose the order for such assessment, together with a statement that shall set forth the condition of the company at the date of the order, the amount of its cash assets and of its deposit notes or other contingent funds liable to the assessment, the amount of the assessment called for and the particular losses or other liabilities it is made to provide for. Such record shall be made and signed by the directors who voted for the order, before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same." The official records of the company show an assessment and a substantial compliance with this statute. It is found that the defendants received due notice of the assessment made against them, and nothing appearing to the contrary it must be held that the assessment was valid under the laws of Massachusetts, and enforceable in this State.

The contract being dependent upon the laws of Massachusetts for its validity, and the assessment, as shown by the official records of the company, being valid under its laws, it is unnecessary to pass upon the objections taken to the deposition of Richard C. Peters, as that part of the deposition objected to did not affect the validity of the assessment under the Massachusetts statute, and its exclusion, on a re-trial, could not change the result.

Judgment affirmed.

THE TOWN OF WESTFIELD *vs.* THE TOWN OF COVENTRY.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed April 13, 1899.

Pauper—Annexed Territory.—When territory is transferred by legislation from one town to another, it is a common-law rule that residents go with the land as regards both their liability to contribute and their right to be supported; and this rule applies to cases arising under the present pauper law, which is governed by residence, as well as it did to those under the former law, which was governed by settlement.

Pauper—Anuexed Territory.—A part of Coventry was annexed to Newport by an act taking effect April 1, 1895. The pauper had resided upon the territory supporting herself for twenty years before that date, and so continued for a year and a half after. She then removed to Westfield where she soon fell in need. *Held*, *Start*, J., dissenting, that Coventry was not liable. Announced also, *Taft*, C. J., declining to concur, that Newport was liable.

Rutland v. *Proctor*, 68 Vt. 153, distinguished.

R. L. 2811, Sub. 9—Effect of Repeal.—A former statute had provided that a person having a legal settlement in territory transferred by legislative act from one town to another but being absent therefrom at the time of the annexation should retain such settlement. *Held*, that the repeal of this statute did not change, but only restored the common law rule above stated, which required that the person should be actually resident upon the territory at the time of the annexation.

ASSUMPSIT. For the support of a pauper. Plea, general issue. Trial by court upon an agreed statement at the September term, 1898, Orleans county, *Munson*, J., presiding. Judgment for the plaintiff. The defendant excepted.

J. W. Redmond for the defendant, cited upon the main question, 18 Am. & Eng. Ency. Law, 798; *Groton* v. *Shirley*, 7 Mass. 156; *Bethlehem* v. *Alexandria*, 32 N. J. L. 66; *Bethany* v. *Oxford*, 15 Conn. 550; *Hay River* v. *Sherman*, 60 Wis. 54; *Hopewell* v. *Independence*, 12 Penn. 92; *Mason* v. *Alexandria*, 3 N. H. 303; *Woodstock* v. *Bethel*, 66 Maine

569; *Franklin* v. *Lebanon*, 51. N. J. L. 93; *Ashland County* v. *Richmond County*, 70 Am. Dec. 49; *Ripley* v. *Levant*, 42 Maine 308; *Westport* v. *Dartmouth*, 10 Mass. 341; *Princeton* v. *West Boylston*, 15 Mass. 257; *Center* v. *Wills*, 7 O. part 2, 171; *Williamsburg* v. *Jackson*, 11 O. 37; and on the distinction between this case and *Rutland* v. *Proctor*, 68 Vt. 153; *New Portland* v. *Rumford*, 13 Me. 299; *Starks* v. *New Sharon*, 39 Me. 368; *West Springfield* v. *Granville*, 4 Mass. 486; *Walpole* v. *Hopkinton*, 4 Pick. 357; *Gilford* v. *Gilmanton*, 20 N. H. 456; 18 Am. and Eng. Ency. Law, 798 and cases there cited.

John Young and *O. S. Annis*, for the plaintiff, contended that the question was one of statutory construction, purely, and involved no question of common law, and cited Roberts' Digest 518, pl. 192; *Worcester* v. *East Montpelier*, 61 Vt. 139; *Craftsbury* v. *Greensboro*, 66 Vt. 585, 594; *Chittenden* v. *Barnard*, 61 Vt. 145; *Vershire* v. *Hyde Park*, 64 Vt. 638; *Granville* v. *Hancock*, 69 Vt. 205; *Fairfax* v. *Westford*, 67 Vt. 390; *Rutland* v. *Proctor*, 68 Vt. 153; *Landgrove* v. *Peru*, 16 Vt. 422.

TYLER, J. This case was tried upon an agreed statement of facts by which it appears that Margaret Berry, the pauper, had resided continuously for more than twenty years next preceding April 1, 1895, in that part of defendant town known as Coventry Gore, which was on April 1, 1895, annexed to and made part of the town of Newport pursuant to No. 287 of the Acts of 1894, and that during all that time she had supported herself and family. She continued to reside there until October, 1896, when she left her house and farm and moved to the plaintiff town, where she has ever since resided. In the spring of 1897 she was poor and in need of relief, and the town of Westfield, by its overseer of the poor, furnished her assistance and called upon Coventry for reimbursement, which was made, and the town of Coventry thereafter,

until March 8, 1898, supported the pauper in the plaintiff town, when it refused longer to support her, and the plaintiff afterwards until the bringing of this suit, supported her, and now seeks in this action to recover for such support under V. S. 3171, which is: "If a person is poor and in need of assistance for himself or family, the overseer of the poor of any town shall, when application for such assistance is made, relieve such person or his family, and if he has not resided in such town for three years, supporting himself and family, and is not of sufficient ability to provide such assistance, the town so furnishing the same may recover the expense thereof from the town where he last resided for the space of three years, supporting himself and family, in an action for money laid out and expended."

The defense is that the land upon which the pauper resided in Coventry was, by the act referred to, annexed to Newport, and that the annexation of the land carried with it the burden of supporting the pauper, although the act contained no provision beyond the setting off of the Gore from Coventry and annexing it to Newport.

It must be conceded that the same legal question would have arisen between Newport and Coventry if the pauper had remained in the former town and been assisted by it, and that town were seeking reimbursement from Coventry.

At common law and under the settlement act it was uniformly held that upon the annexation of a part of one town to another town, persons residing and having their settlement upon the territory annexed, acquired a settlement in the town to which the annexation was made. They went with the territory and held the same relation to the latter town in respect to settlement that they had held to the former one. It is in accordance with the principles of right and justice that the town which derives such advantages as spring from an increased property valuation and an increased population, should assume the duties and burdens incident to the acquisition of the new territory.

Pierpoint, J., in discussing the subject of the settlement of paupers, upon the annexation of the territory upon which they resided in one town to another town, though not deciding this point, said that such persons were left to the application of the general principle applicable to such cases; that the rule established in other states having pauper laws similar to ours was, "that such persons stand in the same relation to the town to which the territory in which they lived was annexed, as regards their settlement therein, as they occupied to the town from which such territory was taken, there being no express statutory provision on the subject." *Wilmington* v. *Somerset*, 35 Vt. 232. *Collamer*, J., remarked in *Corinth* v. *Newbury*, 13 Vt. 496, "But the existence and extent of a town as a municipal corporation, with all its civil privileges and duties, depend, not on the charter, but on laws, subject to constant changes, and its geographical limits liable to alteration. To the same limits that its jurisdiction extends to exact of the citizens taxes, duties and allegiance, do also extend the corresponding municipal obligations to sustain schools, roads, and paupers. Such rights and duties are correlative and inseparable." See 18 Am. & Eng. Ency. of Law, 798; *Groton* v. *Shirley*, 7 Mass. 156; *Oxford* v. *Bethany*, 15 Conn. 246; *Bethlehem* v. *Alexandria*, 32 N. J. L. 66.

By the term *settlement* is meant such a residence in a town as entitles a person to support or assistance upon becoming a pauper. When a person acquires a settlement in a town a duty is imposed upon that town to furnish him support if he becomes poor and in need of assistance. By the settlement act, were it in force, this pauper, down to the time the Gore was annexed to Newport, would have had her settlement in Coventry with a right to be supported by that town. Under the section of the statute above quoted, she had a three years' residence in that town with the same right to support or assistance. Upon the annexation of the Gore, upon which she resided, to Newport, her settlement

and right to support would have been transferred to that town. Does the rule apply under the residence act?

The plaintiff contends that the liability of towns to support their paupers is purely statutory, and that it is entitled to reimbursement from defendant town upon the ground that that was the town of the pauper's last three-years' residence. That the liability of towns is statutory is established by the cases decided by this court and cited upon plaintiff's brief. We think, however, that the pauper's residence, with the right to support incident thereto, was transferred to Newport by the annexation of the Gore to that town by legislative authority. Newport took the territory and the inhabitants thereon with the liability of assisting and maintaining them, if they became poor and in need of relief, as it took the highways with the duty of maintaining and keeping them in repair. This holding is irrespective of the statute and upon the common law principle that Newport took the territory with the incidental benefits and burdens.

The plaintiff claims that R. L. 2811, subdivision 9, provided that the settlement of paupers should go with the territory transferred, and that upon the repeal of that statute there was no authority of law for the transfer of the settlement of paupers when the entity of the town in which they had been settled remained. We think this is not the true construction of this statute. It was the common-law rule that persons having a settlement and residing upon the land transferred went with the land in respect to their settlement. There must have been both a settlement and an actual residence or home upon the land when the act authorizing the annexation was passed. Persons not then residing upon the land, though having their settlement there, did not go with the land. 18 Am. & Eng. Ency. of Law 793; *Mason* v. *Alexandria*, 3 N. H. 303; *Westborough* v. *Franklin*, 15 Mass. 254; *Brewer* v. *Eddington*, 42 Me. 541. It was to meet this state of the

law that R. L. 2811, subdivision 9, was enacted, providing that a person having "a legal settlement therein, but being absent at the time of such division or annexation, and not having acquired a legal settlement elsewhere, shall have a legal settlement in that town wherein his last dwelling-place or home is upon such division or annexation." This statute was so construed in *Wilmington* v. *Somerset.*

Rutland v. *Proctor*, 68 Vt. 153, is not a case in point for the plaintiff. There the latter town was created from territory formerly belonging to Rutland. The only point decided was, that in computing the three-years' residence the time of the pauper's residence in Rutland before the incorporation of Proctor could not be considered, though the entire residence was upon the same territory.

Judgment reversed and judgment for the defendant.

Start, J., dissents.

Taft, C. J., concurs in the result. Will not say Newport is liable.

KATE L. PAGE *vs.* C. H. WARNER, et al.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed April 13, 1899.

Jurisdiction as Determined by Amount.—In an action of debt upon a partially satisfied judgment, the jurisdiction is determined by the amount remaining due at the commencement of the action, not by the amount of the original judgment. Hence a justice, having jurisdiction of causes not exceeding $200, may take cognizance of an action upon a judgment of the county court for $249.15, upon which there was only $145.52 unpaid at the commencement of the action.

DEBT on judgment. The action was begun before a justice of the peace and a motion was there made that it be dismissed for want of jurisdiction. The motion was overruled and an appeal taken by the plaintiff. The motion was renewed in the county court, at the September term, 1898, Chittenden county, *Ross*, J., presiding, the copy of the original record of the judgment and the execution and return thereon being made a part of the motion. The motion was overruled and judgment rendered for the plaintiff. The defendant excepted.

G. W. Kennedy for the defendant.

Brown & Macomber for the plaintiff.

TYLER, J. By V. S. 1040 justices of the peace have jurisdiction of all actions of a civil nature, except those specified, where the debt or other matter in demand does not exceed two hundred dollars. In this case the original judgment was for $249.15, execution was issued, property was levied upon and sold and the proceeds applied, so that when this suit was brought there remained due upon the judgment only the sum of $145.52 and interest. The defendant insists that the test of jurisdiction is the amount of the judgment recovered, and not the amount remaining due when the action is brought; but this is not maintainable either upon principle or authority. The same question has been many times, though in different forms, before this court. In *Southwick, et al*, v. *Merrill*, 3 Vt. 320, the court said: "Where the want of jurisdiction appears from the face of the writ, the defendant may avail himself of the objection by plea; but where from the writ the court, *prima facie*, has jurisdiction, but it appears on trial, from the plaintiff's own showing, that his debt or demand is not of sufficient amount to give the court jurisdiction, the course is to dismiss the action on motion." The converse of this is true in the present case, for the declaration and the claim presented showed jurisdiction in the justice.

It was said in *Miller* v. *Livingston*, 37 Vt. 467, that the "matter in demand," as used in the statute, meant "the plaintiff's cause of action, or in other words, it is the claim which the plaintiff brings his suit for the purpose of enforcing." See *Berry Shoe Co.* v. *Dechenes*, 68 Vt. 387.

If the plaintiff had brought her suit in the county court, and her declaration had shown the part-payment of the judgment, or if she had declared for the full amount of the judgment and the part-payment had been shown at the trial, the action must have been dismissed as "cognizable by a justice."

Judgment affirmed.

CITIZENS SAVINGS BANK AND TTUST COMPANY *vs.* ANCIL C. BABBITT'S ESTATE.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Guaranty—Consideration—Parol Evidence.—Upon the back of an overdue promissory note the defendant executed the following written guaranty: "For value received, I hereby guarantee payment of the within note, and waive demand, notice and protest on same when due." *Held*, that parol evidence was admissible to show a consideration for the guaranty in an agreement on the part of the holder to extend the time of payment.

APPEAL from probate. Special assumpsit. General issue. Trial by jury at the June term, 1898, Caledonia county. *Munson*, J., presiding. Verdict ordered and judgment thereon rendered for the defendant.

The note was payable on demand. The note and guaranty were not offered in evidence except in connection with the oral evidence which was objected to.

Bates, May & Simonds for the plaintiff, cited *Lapham* v. *Barrett*, 1 Vt. 247; *Thrall* v. *Newell*, 19 Vt. 202; *Hakes* v. *Hotchkiss*, 23 Vt. 231: Clark, Contracts, 171, 2; DeColyar, Law Guaranties, marg. page 20, 21, 24; *Ballard* v. *Burton*, 64 Vt. 387; *Hilton* v. *Dinsmore*, 21 Me. 410; *King* v. *Upton*, 4 Me. 387; *Hockenburg* v. *Meyers*, 34 N. J. L. 346; *Thomas* v. *Croft*, 2 Rich. 113: 44 Am. Dec. 279; *Russell* v. *Babcock*, 14 Me. 138; *Vadakin* v. *Soper*, 1 Aik. 287; *Hill* v. *Smith*, 34 Vt. 535; *Van Gorder* v. *Bank*, 7 Atl. 144; *McLaren* v. *Percival*, 102 N. Y. 675; *Goodenough* v. *Huff*, 53 Vt. 482; *Packard* v. *Richardson*, 17 Mass. 122; *Crocker* v. *Gilbert*, 9 Cush. 131; *Rivers* v. *Thomas*, 1 Lea 649: 27 Am. Rep. 784; *Bank* v. *Kaufman*, 93 N. Y. 278: 45 Am. Rep. 204; *Moore* v. *McKenney*, 83 Me. 80: 23 Am. St.; *Chaddock* v. *Van Ness*, 35 N. J. L. 517.

Harry Blodgett and *W. P. Stafford* for the defendant.

The question presented by this case is, whether a party, seeking to recover upon a written contract, may support it by parol proof of a consideration which contradicts the very terms of the defendant's promise.

The undertaking of the defendant is to guarantee payment of the note "when due." The note was overdue when the guaranty was given. The promise was, therefore, to see the note paid at once. *Crocker* v. *Gilbert*, 9 Cush. 131.

An action might have been maintained upon the guaranty the moment after its execution. On trial the plaintiff offered to prove by oral evidence that the consideration for the defendant's promise to see the note paid at once, was the plaintiff's promise not to require payment at once, that is, that the defendant had promised to pay in consideration that he should not be liable to pay.

We do not contend that the statute of frauds, as interpreted by this court, precludes the plaintiff from proving the consideration by parol; but that statute does require

the *promise* to be in writing, and does therefore forbid parol proof of a consideration which contradicts the promise.

But irrespective of the statute of frauds, the evidence was incompetent. It cannot be permissible to support a promise by proof of a consideration which contradicts the promise. One connot, under the guise of showing a consideration, show that the promise itself was other than appears in the contract. Even the rule which allows the consideration to be supplied, explained or varied by parol does not extend to cases in which the consideration itself is contractual, as where a conveyance expressly recites that it is made for the settlement and release of specified claims. *Baum* v. *Lynn*, 72 Miss. 932: 30 L. R. A. 441.

The opinion in the case just cited contains a valuable exposition of the law, and a discriminating citation of authorities upon this question. See also Randolph on Commercial Paper, vol. II., § 565, where it is said: "The rule admitting parol evidence in such cases does not, however, do away with the rule excluding such evidence when offered for the purpose of contradicting or varying a written instrument."

Suppose the plaintiff had commenced an action against the guarantor immediately. Could the guarantor have defended by proving the plaintiff's promise to forbear? Could he thus have contradicted his own promise? If not, can the plaintiff, when it serves his purpose, contradict the promise?

Again, suppose the consideration had been, as alleged, the promise to forbear for a stated time, and the plaintiff had brought action before the expiration of that time. Could the plaintiff then have proved a consideration which not only contradicted the defendant's promise, but also showed the plaintiff's action to be premature?

The question does not arise whether the words, "value received," import a consideration, *prima facie*, for the plaintiff did not offer the writing alone, or by itself, but

only as a part of one general offer which embraced the parol evidence.

TYLER, J. It appeared by evidence admitted without objection, that the plaintiff held the note in question, dated March 24, 1893, against the makers, Edgar Hunt and Henry A. Babbitt, for money loaned to them; that in June, 1895, the plaintiff's treasurer called upon the makers for payment; that Babbitt called at plaintiff's banking-house, informed the treasurer that he could not then pay the note, and inquired if the plaintiff would take the name of his father, Ancil C. Babbitt, as guarantor, and that the treasurer assented.

The plaintiff then offered the note in evidence, and in connection therewith further offered to show that Henry A. Babbitt and the treasurer then made an agreement, that if A. C. Babbitt's guaranty to the note was obtained, the immediate collection of it would be forborne and further time for payment allowed; that in pursuance of the agreement Ancil C. Babbitt went to the bank and executed the following writing upon the back of the note: "For value received, I hereby guarantee payment of the within note and waive demand, notice and protest on the same when due;" and that the plaintiff therefore refrained from collecting the note and granted further time to the makers, which it would not have done without the agreement and guaranty. The offer as made was excluded, and the plaintiff excepted.

It does not appear by the exceptions that the note and guaranty were afterwards received or offered in evidence independently of the parol evidence.

It is true, as claimed by the defendant, that the note was overdue when the guaranty was given; but whether the guaranty was to pay the note at once, and whether an action could have been maintained upon the guaranty immediately after its execution and delivery, depends upon the construction to be given to its terms. It evidently was

not the understanding of any of the parties interested in the note that the guarantor assumed a liability to pay the note immediately. The makers desired more time, the offer of a guaranty was to obtain more time, and the bank was willing to grant it; therefore, in the light of such intention it would be unreasonable to construe the words, "when due," in the guaranty, to mean the then present time so that the guarantor assumed a liability to pay the note at once upon the execution of the guaranty.

It is the duty of the court to give a construction to the guaranty that will carry out the intention of the parties, if it can reasonably be done. The construction given it by the defendant would defeat that intention. We think that the words "when due" qualify the words "demand, notice and protest," and fix the time when these acts are to be done, and not the time when the guarantor was to pay the note.

The defendant concedes that if the guaranty read, "In consideration of the holder's agreement to forbear to sue for a reasonable time, I guarantee the payment of the note after the expiration of that time," it would have been sufficient. The guaranty being silent in respect to the time when the guarantor should pay the note if the makers did not, must mean a reasonable time. The termination of a reasonable time of forbearance and extension was the time when the guaranty was to be operative. This construction harmonizes with the facts that were shown by the plaintiff without objection.

If the guaranty had stated that, in consideration of the plaintiff's forbearance and extension, the guarantor would pay the note at a certain time, the extension must have been construed to mean a reasonable time. This was so held in *Hakes* v. *Hotchkiss*, 23 Vt. 231. See *Ballard* v. *Burton*, 64 Vt. 387. A reasonable time would not necessarily mean the time fixed for payment by the guarantor; but if the time of extension were fixed, and the time when the guaranty should be performed was not mentioned, it

would be taken to relate to the time to which the extension was made. As this writing is silent both as to the time of extension and the time of payment by the guarantor, it should be construed to mean a reasonable time as to both.

The words, "for value received," in the writing, import a consideration, and the admission of parol evidence was unnecessary. But we think that parol evidence was admissible, for it did not tend to contradict, but was entirely consistent with the guaranty as we construe it. It is conceded that an agreement to forbear to sue is a sufficient consideration, if the promise to pay or guarantee is consistent with it. See Baylies on Securities and Guarantors, 56.

In the light of the offered parol evidence the guaranty would mean: In consideration of the bank's forbearance and extension of time of payment to the makers of this note for a reasonable time, I guarantee payment of the note at the end of that time. What was a reasonable time was a question of fact for the jury. We think that the note, guaranty and parol evidence offered were admissible.

Judgment reversed and cause remanded.

Rowell, J., dissents.

THOMAS E. TURNEY *vs.* J. E. GILLETT.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Lien—Construction of Contract.—The plaintiff gave the defendant a bond which recited that he had sold to the defendant a farm, six cows and certain other property, for two thousand dollars, to be paid, a certain amount with interest on the whole debt, each year, and that when nine

hundred dollars and interest had been paid, the defendant should have a deed and give a mortgage back for the balance; a lien was then reserved upon the crops, wood, bark and lumber, and the butter and income from the cows, until "said payments are made." *Held*, that the lien was security for the nine hundred dollars with interest, and not merely security upon each year's product for the payment due that year.

TROVER. Trial by court at the March term, 1898, Washington county, *Munson*, J., presiding. Judgment for the defendant. The plaintiff excepted.

The court found the following facts:

The defendant is in the possession of the farm mentioned in the contract. The plaintiff claims to recover for five thousand pounds of milk and some hemlock bark disposed of by the defendant in the year 1896. The milk was delivered to a cheese factory, and the avails taken by the defendant. The bark was peeled from some hemlock cut by the defendant in June, 1896, and was sold by the defendant in the fall of that year. The defendant received $50 for the milk and $15 for the bark. He has not accounted to the plaintiff for these sums, otherwise than by meeting his payments for the year. June 6, 1896, the plaintiff received $50 in payment of the note due June 1st, 1896. November 28, 1896, he received $73 to apply on the interest due December 1st, 1896. April 22, 1897, he received on wood sold $47.10, balance due on interest of December 1st, 1896. This suit was brought November 18, 1897. The reservation covering this property is that it shall be and remain the plaintiff's "till said payments are made."

The court construed this to mean the payments for the year, and rendered judgment for the defendant.

E. F. Palmer for the plaintiff.

F. L. Laird for the defendant.

START, J. The plaintiff's right to the property declared for is dependent upon the construction of a bond given by him to the defendant, which recites, that the plaintiff has sold to the defendant a farm, six cows, and certain other

property, for the sum of two thousand dollars; and, after providing for annual payments and interest, sets forth, that, when the sum of nine hundred dollars, with interest on the whole debt, has been paid, the plaintiff shall execute to the defendant a warranty deed of the farm. The bond also provides, that the defendant shall give a mortgage to secure the balance of the debt; and that the crops raised on the farm, all butter and income from the cows, all wood, bark and lumber cut on the farm, shall be and remain the plaintiff's until "said payments are made."

The defendant contends, that, by this condition, a lien is reserved only on property mentioned therein, for the payment due, or to become due, the year in which such property is produced from the farm and cows; but we think this is not the true construction of the reservation. When payments aggregating nine hundred dollars of the principal and interest on the whole debt have been made, the property is to be conveyed. Then follows the reservation, which continues in force until the "said payments are made." The words, "said payments," clearly refer to the payments that make the sum of nine hundred dollars, and are to be made before the plaintiff is under any obligation to convey the property; and the plaintiff's lien continues and attaches to all crops raised on the farm, all butter and income from the cows, all wood, bark and lumber cut on the farm, until the full sum of nine hundred dollars is paid, and is not terminated as to property produced in any one year, on payment of the sum falling due during that year.

Judgment reversed; judgment for the plaintiff.

THE PASSUMPSIC SAVINGS BANK *vs.* ORVILLE G. BUCK et al.

October Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed January 26, 1899.

Mortgage—Record of Assignment—Purchaser Put upon Inquiry.—The assignee of a mortgage who omits to have the records show the transfer, takes the risk of a wrongful discharge of record by the mortgagee, and the acquisition of the title by one relying on the discharge and without notice of the assignment; but he takes no risk as against such purchaser with notice of the assignment, and the mere lapse of time makes no difference.

Mortgage—Record of Assignment—Purchaser Put upon Inquiry.—A second mortgage contained a clause reciting the existence of the former mortgage and adding that the notes secured thereby were then owned by another party named, as the fact was. There was never any written assignment of the first mortgage, and some years after the execution of the second, the first was discharged on the record by the mortgagee therein named, but without right and probably by mistake. An intending purchaser of the second mortgage examined the records and read the clause referred to but made no further inquiry, and purchased relying upon the recorded discharge. *Held*, *Start*, J., dissenting, that he could not defend against a foreclosure of the first mortgage, being chargeable with notice of the fact, which he could have learned upon inquiry, that the first mortgage was outstanding and had never been rightfully discharged.

PETITION to foreclose a mortgage. Heard on pleadings and master's report, at the June term, 1898, Caledonia county. *Munson*, Chancellor, rendered a decree of foreclosure in the usual form. The defendants appealed.

Bates, May & Simonds for the orator.

M. M. Buck and *G. E. Monteith* for the defendants.

ROWELL, J. This is a petition to foreclose a mortgage from the defendants Orange Buck and Abijah H. Buck to James Atwell, dated July 14, 1874, and recorded the same day. On February 13, 1879, said defendants executed a

mortgage of the same premises, and other land, to Carlos D. Oakes, which was recorded the next day. In said last-mentioned mortgage, immediately following the warranty against incumbrances, was this: "Excepting a mortgage on the first described piece of about four hundred dollars to James Atwell and notes now owned by Samuel Merriam." Said Merriam bought the Atwell note, then overdue, and the mortgage, about two years after they were given, and they were then transferred to him, and were owned and held by his estate when the Oakes mortgage was given, he having died the September before; and they are now owned and held by the petitioner, and the note has never been fully paid.

On November 20, 1889, nearly four years after the petitioner became such owner and holder, Atwell made and signed an entry on the margin of the record of said mortgage, acknowledging satisfaction thereof; but he had no right to do it, and it does not appear how he came to, though the master thinks it was by mistake.

On January 5, 1890, the defendant Orville G. Buck bought and paid for the Oakes mortgage, and it was assigned to him the same day; and on March 13, 1897, the other defendants quitclaimed to him the premises in question, and he surrendered to them the Oakes note and mortgage in consideration thereof. Before buying the mortgage, he examined the records, found the record of it, and read the exception therein, and also found the entry of satisfaction of the Atwell mortgage. He then sent a man to examine the records for him, who found the same that he had. He made no further inquiry, but bought, relying on the records, which showed no assignment of the Atwell mortgage, and it does not appear that it ever was assigned in writing. Had he inquired in the direction indicated by the information he received by reading the exception in the Oakes mortgage, he would have learned that the Atwell mortgage and the note thereby secured were owned and held by Merriam's

estate when the Oakes mortgage was given; that they were owned and held by the petitioner when Atwell assumed to discharge the mortgage as aforesaid; that the note was not fully paid; and that Atwell's discharge was without authority, and therefore a fraud upon the petitioner. And he must be taken to have had actual knowledge of all this, for the information he received undoubtedly put him on inquiry in respect of it, and enabled him to prosecute that inquiry in the usual course of such business to a successful termination. *Stevens* v. *Goodenough*, 26 Vt. 676, 684; *Adams* v. *Soule*, 33 Vt. 538.

The assignee of a mortgage who omits to have the records show the transfer, takes the risk of a wrongful discharge of record by the mortgagee, and the acquisition of title by one relying on the discharge and without notice of the assignment. *Torrey* v. *Deavitt*, 53 Vt. 331, and *Ladd* v. *Campbell*, 56 Vt. 529, are cases of this kind. But he takes no risk as against such purchaser with notice of the assignment. A record of the assignment is only for notice; and if notice is given some other way, it is just as good against the person to whom it is given. The cases last cited show this plainly enough. And Mr. Jones says that "no assignment of the mortgage is necessary as against those having actual notice of the transfer of the notes." 1 Mortgages, § 820, 2d ed. The same thing is said in 15 Am. & Eng. Ency. of Law, 846. And this is the doctrine of the cases generally.

The lapse of time makes no difference, as has been suggested. In *Le Neve* v. *Le Neve*, Ambler, 436: 2 Lead. Cas. Eq. [*23]—lands in a register county were settled by a deed not recorded. Twenty-five years after, they were again settled, with notice of the former settlement, and the second settlement duly registered. The former settlement was preferred in equity. In *Corliss* v. *Corliss*, 8 Vt. 373, an attempt was made to avoid by lapse of time, with other circumstances, the effect of notice of an unrecorded deed, but without avail.

The defendants Orange and Abijah contend that they are not proper parties, because they had no interest in the mortgaged premises when the suit was commenced. But it is too late for them to raise that question. Their conveyance to the other defendant is alleged in the petition; and as they did not demur for misjoinder nor raise the question in their answer, they must be taken to have waived it. *Wing* v. *Cooper*, 37 Vt. 169, 185; Story, Eq. Pl. § 544, 10th ed.

Decree affirmed and cause remanded.

CITY OF MONTPELIER *vs.* TOWN OF ELMORE.

October Term, 1898.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Pauper—Divorce.—A divorced wife no longer takes the legal residence of the husband.

Divorce—Parental Duty to Support.—A decree of divorce, granted to a wife, with the care and custody of minor children, does not absolve the husband from his parental duty to support.

Pauper—Divorce—Liability for Support of Child.—When a question arises between towns, touching liability to support the minor children of divorced parties, if the custody has been decreed to the mother it is her residence that governs.

ASSUMPSIT. General issue. Trial by court in the city court of Montpelier. Judgment for the defendant. The plaintiff excepted.

Lord & Carleton for the plaintiff.

G. M. Powers for the defendant.

TYLER J. It appeared that at some time prior to the

September term, 1895, of Washington county court, Charles B. Batchelder, then residing in Montpelier, abandoned his family and ceased to contribute to their support, and that at that term his wife obtained a divorce from him with a decree for the care and custody of their minor son. The mother, with her son, continued to reside in Montpelier, and in the spring of 1897 applied to the overseer of the poor of that city for assistance in the support of the son, who was in need of relief. The overseer furnished the then necessary relief, and subsequently agreed with the mother to give her three dollars a week for her son's maintenance. The parents had lived in defendant town the four years next after April 1, 1877—during which time this son was born—and supported themselves, and never afterwards lived in any town for a period of three years. This action is brought to recover the amount furnished by the plaintiff city for such support.

The arguments have proceeded upon the ground that the assistance was furnished for the minor through the family of either the father or the mother. The plaintiff's counsel claim that the father continued to be the head of the family after the divorce, that the legal obligation rested upon him to support his son, and that as his residence was in defendant town, that town became chargeable for the pauper's support. The defendant contends that the mother, upon obtaining the divorce, became the head, and was the poor person in need of assistance for her family.

Under the former law relative to the settlement of paupers, the mother, upon obtaining the divorce, would have taken the settlement of her husband, but that law was repealed by the Act of 1886 which substituted "residing" for "lawfully settled." *New Haven* v. *Middlebury*, 63 Vt. 399: *Vershire* v. *Hyde Park*, 64 Vt. 638.

As the mother has resided in the plaintiff city since obtaining her divorce, that city was bound to provide assistance in the support of her son, unless the legal

obligation of the father to support him, continuing after the divorce was granted, fixed the son's residence with him.

The divorce and the decree giving the care and custody of the son to the mother did not absolve the father from his parental duty to support the son. It is a universal rule, that when a wife obtains a divorce from her husband on account of some breach by him of a marital duty, and has the custody and care of the minor children decreed to her, the father's obligation to support such children remains in force. If this were otherwise the father would by his own wrong escape the performance of a natural and legal duty. The court which grants the divorce and makes the orders has control of the case, and may from time to time make further orders upon the husband in respect to the maintenance of the minor children as their varying circumstances may require. This was so held in *Buckminster* v. *Buckminster*, 38 Vt. 248.

The fact that a wife obtains a bill of divorce from her husband and becomes a *feme sole*, precludes the idea of her longer taking his residence.

A decree for alimony, made when a bill of divorce is granted, to enable the mother to support the minor children, does not, nor do subsequent orders make for that purpose, depend upon the residence of either party to the divorce suit. But when the question of the liability to support the mother and children arises between towns, that question is determined by the fact of the mother's residence. After the divorce she takes a residence in her own right, and the minor children, whose custody has been decreed to her, take her residence.

In the present case, the custody of the son having been taken from the father and given to the mother, the latter became the head of the family, with her residence in the plaintiff city.

Judgment affirmed.

LOOMIS J. SMITH *vs.* PATRICK J. COSGROVE.

October Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Construction of Burlington City Charter—Vacancy—Term of Office—Under the charter of the city of Burlington, Acts 1896, No. 140, when a vacancy occurs in the office of chief of police, the vacancy is in the office, not merely in the term of service, and the new appointee is in for a whole term, not alone for the unexpired term of the old officer.

PETITION to the supreme court for the county of Chittenden for a writ of *quo warranto*. Heard on complaint, answer and evidence at the October term, 1898.

H. S. Peck for the complainant.

V. A. Bullard and *Dillingham, Huse & Howland* for the defendant.

At the time of the passage of the charter of 1896, provision was make whereby all city officials should fill out their respective terms of office, as will be seen by examination of § 277 of the charter of 1896, a part of which is as follows: "And the mayor and aldermen of said city and all city officials holding office therein under and by virtue of the general laws of this State, or the acts or part of acts hereby amended and repealed, shall hold office till the expiration of their current terms of office, unless such office shall sooner become vacant under the provisions of the general laws of this State, or the provisions of such acts so amended and repealed." Therefore Mr. Dumas was not only entitled to hold his office by virtue of his appointment from Mayor Van Patten until April 25, 1898, but also by reason of a provision in the present charter to that effect. Under the circumstances, therefore, there was no

necessity for providing in the present charter for the beginning of the chief of police term. It had been fixed by the act 172 and adopted by the charter of 1896 by the provision therein that the chief of police should continue in office until the expiration of this term. Under the law, there could be no appointment until the expiration of Mr. Dumas's term and then it was the duty of the mayor to make an appointment at such a time and in such a way as would prevent a vacancy in this office, which he must do on the 25th day of April, 1898.

The office of chief of police, therefore, under act 172 and under the present charter, is one for a term of definite duration, with a fixed time for beginning and ending. Under these circumstances, it has been uniformly held that an appointment to fill a vacancy must be for that part of the term unexpired and for no longer time. *People* v. *Green*, 2 Wend. (N. Y.) 266; *Attorney General* v. *Brunst*, 3 Wis. 787; *People* v. *Townsend*, 102 N. Y. 430: S. C. 40 Hun. (N. Y.) 360; *People* v. *Burbank*, 12 Cal. 378; *Sansbury* v. *Middleton*, 11 Md. 296; *Crowell* v. *Lambert*, 9 Minn. 283; *People* v. *Coutant*, 11 Wend. (N. Y.) 132 id. 511; *Keys* v. *Mason*, 3 Sneed (Tenn.) 6; *Banton* v. *Wilson*, 4 Tex. 400; *Meredith's Case*, 33 Gratt (Va.) 119; *Marshall* v. *Harwood*, 5 Md. 423; *Whipper* v. *Reed*, 9 S. C. 5.

Then, by act 172 and by the charter of 1896, "The mayor shall fill all vacancies during the year" in the terms of policemen by appointment from the list of applicants whose names shall have been certified to him by the board of police examiners and, of course, in that of the office of chief of police, from the same source from which the appointment was made. Char. 1896, § 218.

Any other construction than the one contended for by the defendant in this case would be contrary to the spirit and policy of our laws and institutions; for it is not in accordance with our policy of government to so intrench the office-holder in his office as to make it almost impossible

to dislodge him however obnoxious he may become to those he is supposed to serve. But the far better construction to adopt if possible, we insist, is the one that will protect the official against the caprices of a fickle master and at the same time shield the public from a protracted use of arbitrary power. The only way by which these two things can be accomplished, that is, the protection of the office-holder and the community at the same time, is to make the time apply to the term of office and not to the official, and also by making the term of office comparatively a short one with a definite time for the beginning and ending.

So much favor has been attached to the idea that short and definite terms of office are desirable, that in many well-considered cases it has been held that even in the absence of any constitutional or statutory provisions fixing the term, a person appointed to fill a vacancy holds only to the expiration of his predecessor's term. Throop Public Officers, Book 3, § 320; *Hughes* v. *Buckingham*, 13 Miss. 632; *People* v. *Breen*, 53 N. Y. Super. Ct. 167.

The office of chief of police for the city of Burlington is one of great importance. While it is created for the protection of the citizens and residents of the city, yet it may be used for their oppression and injury. If the construction contended for by the complainant is the correct one, however obnoxious the person holding the office of chief of police may be, and however great may be the desire on the part of the community to be rid of him, still, it would be quite impossible to prevent his holding the office for at least six years instead of three as obviously intended by the charter, if he is on friendly terms with the mayor, as he must be to have been appointed to the office in the first instance. For after the official who has appointed the chief of police sought to be rid of, has been defeated at the polls because, perchance, of the misconduct and non-acceptability of the person he has appointed and who is holding the office of chief of police, yet, before yielding up

his office as mayor, he might, in the morning accept the resignation of his chief of police and in the afternoon, by reason of the vacancy thus created, appoint this same person for another three years' term.

START, J. The complainant was appointed chief of police for the city of Burlington, on the 16th day of March, 1898, and he contends that his term of office is for three years from the date of his appointment. The respondent claims, that Jerome Dumas was, on the 25th day of April, 1895, appointed chief of police; that his term of office was for three years from that date; that he held the office until his death, Feb. 4, 1898; that the complainant's appointment was, under the charter, for the unexpired term of Jerome Dumas's appointment; that the term for which the complainant was appointed expired on the 25th day of April, 1898; that on that day he, the respondent, was appointed chief of police for three years; and that he holds the office of right, under his appointment and the city charter.

Under the charter, as amended by No. 172 of the Acts of 1894, it was the duty of the mayor, on the 25th day of April, 1895, to appoint a chief of police for the term of three years from the 25th day of April, 1895. By No. 148 of the Acts of 1896, the charter and all acts relating thereto were amended so as to read as is prescribed therein, and the rights of the parties must be determined from an inspection of this act, as nothing contained in the prior enactments not incorporated into this act was in force at the time the parties received their respective appointments. Section 278 of the last enactment provides, that the provisions of the act, so far as they are the same as those of acts thereby amended, shall be construed as a continuation of such acts and not as new enactments; but this does not continue in force any prior enactments that are not the same as the later enactment. Therefore, the earlier acts that are not the same as the act of 1896 are repealed, and we must look to, and be governed by, the act of 1896 in determining the term

of office of the chief of police, whether appointed to fill a vacancy caused by death, removal, resignation, or to take the place of a chief of police whose term has expired. *Barnet* v. *Woodbury*, 40 Vt. 266; Endlich on the Interpretation of Statutes, § 196. Section 215 of the charter, as amended by the act of 1896, provides for a regular police force for the city consisting of a chief of police, who shall be appointed by the mayor and shall hold his office for three years, unless sooner removed, and such number of other police officers as the mayor shall deem necessary for the welfare of the city, who shall hold office for such term, not exceeding three years nor less than one year, as shall be designated by the mayor in his appointment. By this section, it is clear, that, whenever a chief of police is first appointed, under the charter, he holds his office for three years from the date of his appointment, unless sooner removed; and we look in vain for any authority in the charter, as made to read by the act of 1896, for appointing a chief of police for a shorter period. Section 277 of the act provides, in part, that the city officials holding office therein under and by virtue of the general law of the State, or the acts or parts of acts thereby amended or repealed, shall hold office till the expiration of their current terms, unless such office shall sooner become vacant under the provisions of the general law of the State, or the provisions of such acts so amended or repealed; but this in no way affects the term of office of a chief of police appointed thereafter, under the charter, as we have seen that § 215 fixes the term of his office. When it becomes necessary to appoint a chief of police under the new charter by reason of death, removal, resignation, or to fill the place of one whose term has expired, the appointee holds his office for three years from the date of his appointment, unless sooner removed. The language of this section is plain and unmistakable, and there is nothing in the charter relating to the filling of a vacancy in the office of chief, or appointment

to that office, that in any way limits or qualifies its provisions. The charter, as amended by the act of 1896, does not fix the time when the term of office of chief of police shall commence. It only provides for his appointment, and that he shall hold the office for three years, unless sooner removed. In the absence of any provision of the charter fixing the time when his term shall commence, it must be held that his term begins when he is appointed and qualified and continues for three years, unless he be sooner removed. When a statute creates an office and provides that it shall be filled by election or appointment for a term of years, and is silent in regard to when the term shall commence, and makes no special provision for filling a vacancy in the office, or respecting the term for which one appointed to fill a vacancy shall hold the office, and there are no general provisions of the statute that are applicable, there are no grounds for inferring an exception in case of a person elected or appointed to the office when it has become vacant by reason of the death, resignation or removal of his predecessor.

In *People* v. *Green*, 2 Wend. 266, under a constitutional provision that sheriffs should be elected once in every three years and as often as vacancies should occur, it was held that the vacancy was in the office and not merely in the term of service of the person elected to fill it, and that an election on the occurring of a vacancy was for the full term of three years, and not for the unexpired term of the predecessor.

In *Crowell* v. *Lambert*, 9 Minn. 283, under a constitutional provision that a probate judge shall be elected for the term of two years, and that, in case of a vacancy, the governor shall fill the vacancy by appointment until a successor is elected and qualified, and that such successor shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have occurred, it was held that the person elected on the occurring of a vacancy holds the

office for the full constitutional term of two years, and not merely for the unexpired term of his predecessor.

In *People* v. *Burbank*, 12 Cal. 378, it is held that a district judge whose election is occasioned by a vacancy in the office is, under the constitution, which fixes no day for the commencement of the term, elected for the full constitutional term. Under similar constitutional provisions, in *People* v. *Townsend*, 102 N. Y. 430, and in *Sansbury* v. *Middletown*, 11 Md. 296, the holdings are to the same effect.

If Dumas was appointed chief of police, he held the office after the new charter took effect, by virtue of that part of § 277, which provides that the city officials holding office therein under acts thereby repealed shall hold office till the expiration of their current terms of office, and not by reason of the term of office of the chief of police under the old charter being continued. The right to hold the office for the term provided by the old charter was personal to him, and his right was all there was in the way of the mayor's making an appointment for three years under the new charter. When he died, the term of the office, under the saving clause in the new charter, expired; and there was no unexpired term to be filled. When he ceased to exercise the right secured to him, there was no vacancy to be filled under the old charter, for it was no longer in force; nor was there a vacancy to be filled under the saving clause of the new charter, for that provided only for the term of office for such officials as were in office when the new charter took effect. It did not provide for the term of office of the chief of police thereafter appointed. The term of his office is controlled by § 215 of the new charter, and at the time Dumas died, no appointment had been made under it. While Dumas held the office under the saving clause of § 277 of the new charter the right to appoint a chief of police under the provision of the new charter was suspended. When he died, the obstacle to an appointment was removed, and the new charter, in so far as it related to the appointment of a chief of police,

for the first time became operative; and thereupon the complainant was, under the new charter, appointed chief of police. There is nothing in the charter that makes the term for which he is appointed any less than it would have been if there had been no chief of police in office when the new charter took effect.

If Dumas was not appointed chief of police, when the new charter became operative, there was no chief of police, and the mayor could, at any time after the act was in force, appoint a chief of police, who would hold his office for three years from the time he was appointed. The complainant was the first appointee under the new charter and his term of office is for three years from the time he was appointed. He is, therefore, entitled to hold the office until the expiration of that term, unless sooner removed under the provisions of the charter.

Complaint sustained, writ awarded, and judgment that the complainant is entitled to said office, and that the defendant do not in any manner intermeddle therewith nor concern himself in nor about the same, but that he be absolutely forejudged and excluded from exercising any of the functions thereof, and that he do pay the costs of this proceeding.

Ross, C. J., dissents.

H. H. HOLT *vs.* A. P. LADD et al. defts., BOSTON & MAINE R. R. tr., and CITIZENS SAVINGS BANK & TRUST COMPANY, clt.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, MUNSON, and THOMPSON, JJ.

Opinion filed January 12, 1899.

V. S. 1310.—A railroad operating its line within this State and having a superintendent resident here may be held upon trustee process as to debts arising in the business conducted by such authorized agent and payable here.

Trustee Process—Presumption.—When a claimant of funds in the hands of a trustee has foreclosed a mortgage securing his debt against the defendant, and it appears that as between him and the defendant the fund in the trustee's hands was the claimant's, it is to be presumed the fund was applied in reduction of the mortgage debt in the foreclosure proceedings, for it was the duty of the claimant to have the application made. Consequently the plaintiff in the trustee process cannot treat the debt as paid by the foreclosure.

Presumption.—The claimant was entitled to the indebtedness accruing for the use of a pump only from the time when it took possession under its mortgage, and possession having been found by the commissioner to have been taken sometime during the month of March, it is treated as having occurred on the middle of the month, this being fair to both parties.

TRUSTEE PROCESS. Heard upon a commissioner's report at the June term, 1898, Orange county, *Start*, J., presiding. Trustee adjudged liable in the sum of $145.21. Claimant excepted.

The trustee, the Boston & Maine Railroad, is incorporated under the laws of Maine, Massachusetts and New Hampshire. When this trustee process was served it was operating the Passumpsic Railroad in Vermont under a lease. The leased road is known as the Passumpsic division of the Boston & Maine Railroad; its principal office is in the town of Lyndon, Vermont, in charge of the division

superintendent who resides in the same town and has charge of the Vermont business of said division. The employees are paid directly by the trustee and not through the division superintendent.

Before their insolvency, Babcock & Howard had a contract with the Boston & Maine Railroad to pump water through an aqueduct, belonging to the railroad, into a tank for which they were to be paid $200 per year; they were paid to December 1, 1894, and nothing was paid after that. The pump used was the property of Babcock & Howard, and was in the mill mentioned in the opinion. The amount due for pumping, and unpaid, was $79.21.

Bates, May & Simonds for the claimant.

R. M. Harvey for the plaintiff.

Ross, C. J. (1) The trustee is operating a railroad within this State. Its superintendent for operating the railroad resides within this State. The debts sought to be attached, in its hands, by the trustee process, were contracted in operating the railroad within this State, and were payable here. The trustee was amenable to the trustee process. V. S. 1310 makes such debts, due from a non-resident, attachable by the trustee process, duly served on the authorized agent of such non-resident. The debt sought to be attached must be one arising in the business conducted by such authorized agent. *Towle* v. *Wilder*, 57 Vt. 622. When it so arises, and the non-resident debtor has an authorized agent, resident within the State, either to conduct the business within the State or appointed especially to receive service for the non-resident debtor in regard to the business done within the State, the debt may be attached by service, according to the statute, upon such agent. *Weed* v. *Boutelle*, 56 Vt. 570; *Chaffee* v. *Railroad Co.*, 55 Vt. 110, opinion 140.

(2) The debt of $66 arose from the purchase of lumber, April 16, 1895. As we understand the report of the

commissioner, the claimant had a chattel mortgage, given February 11, 1895, which covered this lumber, and in March, 1895, took possession of the lumber under this chattel mortgage, and of the mill under its real estate mortgage of the date of February 11, 1895, which covered the mill. The mill and lumber belonged to and were mortgaged by defendants Babcock & Howard. No question is made in regard to the validity of these mortgages. The claimant made defendant Babcock its agent to manage the mill, manufacture and sell the lumber. He hired the help, and made the sales, and reported to the claimant. He reported this sale, when made, to the claimant. The claimant paid the help. This was done under an agreement with the mortgagors, Babcock & Howard. It is not found whether the business was done by Babcock, in the name of the claimant, or in the name of Babcock & Howard. Remittances for purchases of lumber were sometimes made by the purchaser directly to the claimant, and sometimes through Babcock & Howard who endorsed the check to the claimant. When the trustee made the purchase for which this indebtedness arose it did not know that the claimant held a mortgage on the lumber, but it had notice that it held the mortgage long before this writ was served upon it. The findings of the commissioner are not very specific and definite, but from all his findings we think there is no doubt that this debt belonged to the claimant, as between it and Babcock & Howard, and that the trustee had notice that it did, before the service upon it of the writ in this case. This would entitle the claimant to hold this amount, if nothing further is found to prevent it. The plaintiff contends that by the foreclosure of its real estate mortgage in June, 1896, before this suit was commenced (August 11, 1896) the mortgage debt, under which the claimant took possession, and the lumber, for which this debt was contracted, was sold, had become fully paid. This debt for the lumber, when contracted, belonged to the claimant as regards the

debtors, Babcock & Howard. So at the time of bringing this suit, August 11, 1896, it belonged to them. It is not found whether the claimant did or did not account for it in ascertaining the sum due on its mortgage, in the foreclosure of its mortgage. It was under a duty to account for it and presumably did its duty in that respect. The plaintiff cannot raise the question that he is in a better position than his debtors, Babcock & Howard, and hold this debt due from the trustee, unless he establishes that the claimant did not account for this sum when the sum due on its mortgage was ascertained in the foreclosure proceedings. If the plaintiff had shown, and had it found by the commissioner, that the claimant did not then account for this debt, he might have raised the question he now attempts to raise. If the claimant intentionally, or by mistake, omitted to have this sum applied on the mortgage debt and by the foreclosure the mortgage debt has become fully paid, it might fairly be contended that this debt belongs to Babcock & Howard, the debtors of the plaintiff; that by such omission, the claimant, as to them, waived all right to this debt, due from the trustee. On the facts found, whether the amount found due on the mortgage is, by its foreclosure, presumptively paid, is immaterial. Under all the facts found, the claimant is entitled to hold this debt due from the trustee.

(3) The claimant was not entitled to any of the indebtedness which accrued from the use of the pump until it took possession under its mortgage which is found to have been in March, 1895. No specific date in March being found, it is presumed to have been the middle of March. This would be fair to both parties. What accrued from December 1, 1894, to March 15, 1895, for the use of the pump, would belong to the debtors, Babcock & Howard, and be subject to attachment by the plaintiff so far as the parties before the court in this suit are concerned. What may have been, or are, the rights of the assignee in insolvency to this part

of the sum of $79.21, is not raised by the commissioner's report. The sum thus attachable by the trustee process is $58.34. The balance, $20.87, on the facts reported, belongs to the claimant. Those facts bring it within the principles considered in regard to the $66.

Judgment of the county court reversed, and judgment that of the funds in the trustee's hands the claimant is entitled to the sum of $86.87; and the trustee is adjudged liable for the remaining sum of $58.34, less the costs of the trustee. The claimant to recover its costs.

RUTLAND PROVISION CO. *vs.* GEORGE W. HALL, JR.

October Term, 1898.

Present: ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 26, 1899.

Check—Holder for Value.—One who receives from his debtor, and credits upon account, the accommodation check of a third person, but afterwards, when it has gone to protest, charges it back to his debtor, is still a *bona-fide* holder for value, and may recover against the drawer.

ASSUMPSIT. General issue. Trial by jury at the May term, 1898, Windsor county, *Ross*, C. J., presiding. Verdict ordered and judgment thereon for the plaintiff. The defendant excepted.

The plaintiff rested after introducing the check and certificate of protest, which were admitted against the defendant's exception. Whereupon the defendant, against the plaintiff's exception, made proof of the other facts stated in the opinion.

F. C. Davis and *G. A. Davis* for the defendant.

Stickney & Sargent for the plaintiff.

ROWELL, J. Barney, being indebted to the plaintiff for goods sold and delivered, sent to it his two checks on account thereof, which were received and credited but went to protest, whereupon they were charged back, with the protest fees, as the plaintiff's custom was in such cases. Thereupon Barney obtained the defendant's accommodation check, payable to the plaintiff, and sent it for the same purpose, and it was received and credited and Barney's checks returned; but that check went to protest also, and was charged back like the others, leaving the account still unpaid. The plaintiff, however, retained the check and brings this suit upon it, and the question is whether it is a holder for value, so it can recover.

It does not appear whether the check is negotiable or not; but if it must be in order to sustain the judgment, we must presume that it is. The plaintiff did not take the check to collect for Barney and as his agent. If it had, its title would have been no better than his. But it was a party thereto, and took it on account of its debt, of which it was, in the circumstances, a conditional payment, the condition being that the debt would revive if the check was not paid on seasonable presentment. This is obviously the effect intended by both parties to the transaction. The check was sent and received as money's worth, and justice requires that it should be as truly the property of the plaintiff as would have been the money that it represents had it been paid. *Torrey* v. *Baxter*, 13 Vt. 452; *Collamer* v. *Langdon*, 29 Vt. 32, 42. And the plaintiff has a right to retain the check till his debt is paid. *Poirier* v. *Morris*, 2 El. & B. 89.

The English rule is, that when a negotiable security, whether a bill of exchange or a note payable at a future day, or a check or a note payable on demand, is given on account of a pre-existing debt, the creditor taking the same

bona fide becomes a *bona-fide* holder for value. *Currie* v. *Misa*, L. R. 10 Ex. 153: 4 Eng. Rul. Cas. 316, and notes. This case was taken by appeal from the Exchequer Chamber to the House of Lords—L. R. 1 App. Cas. 554—where the judgment was affirmed on another ground, but one not affecting the soundness of the ground adopted by the court below, which was expressly affirmed in *McLean* v. *Clydesdale Banking Co.*, a Scotch appeal, L. R. 9 App. Cas. 95, in which the question arose out of a check drawn by McLean on the Bank of Scotland. The check had been paid into the Clydesdale Bank by Cotton, one of its customers, whose account was at debit, and immediately credited by the bank to his account in reduction of the debt. Before the check could be cleared and transmitted to the Bank of Scotland, McLean stopped it, so that, in the usual course, the latter bank refused payment and returned it to the Clydesdale Bank to "refer to drawer." The Clydesdale Bank having sued McLean on the check, he pleaded fraud in the original transaction, and the bank replied that it was a holder for value, and the House of Lords so decided.

The rule is the same in this country by a great weight of authority, including that of the Supreme Court of the United States. See American note to *Currie* v. *Misa*, 4 Eng. Rul. Cas. 330. A very full and satisfactory discussion of this question will be found in *Railroad Co.* v. *National Bank*, 102 U. S. 14, especially in the opinion of Mr. Justice *Clifford*.

Judgment affirmed.

FREDERICK KOPPER *vs.* ROBERT FULTON.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Ejectment—Construction of Contract by Conduct of Parties.—Plaintiff and defendant, by contract under seal, agreed, the former to convey to the latter certain real estate and personal property, and the latter to convey to the former certain other real estate and to allow the plaintiff to occupy for three years, free of rent, a cottage included in the real estate which the plaintiff was to convey to the defendant. The plaintiff conveyed the real estate as agreed, and instead of occupying the cottage himself expressly permitted the defendant to do so for two of the three years, after which he demanded but was refused possession. *Held*, that the parties had by their conduct construed the deed and contract together and treated the cottage as leased to the plaintiff, and that the plaintiff might maintain ejectment whether he had transferred the personal property or not.

EJECTMENT. Trial by court at the June term, 1897, Addison county, *Munson*, J., presiding. Judgment for the plaintiff for possession and damages and costs. The defendant excepted.

Charles F. Kingsley for the defendant.

The relation of vendor and vendee is the one that exists between the plaintiff and defendant. Ejectment is not available in this State. This action of ejectment is founded on a mutual contract. In its legal effect it is an equitable proceeding. To maintain it, involved proof of performance, or tender of performance, or a legal excuse for the lack of the same, by the plaintiff. Only part payment has been shown. This is not enough. *Pratt* v. *Peckham*, 44 Hun. 247; *Downer* v. *Richardson*, 9 Vt. 377; *Davis* v. *Hemenway*, 27 Vt. 589; *Pitkin* v. *Burch*, 48 Vt. 521; *Mack* v. *Dailey*, 67 Vt. 90; *Hadley* v. *Havens*, 24 Vt. 520; *Norton* v. *Perkins*, 67 Vt. 206.

"Ejectment will lie to enforce a condition, but not a consideration." *Cook* v. *Trimble*, 9 Watts, (Penn.) 15; *Garver* v. *McNulty*, 39 Penn. 473; *Heacock* v. *Fly*, 14 Penn. 540; *Bortz* v. *Bortz*, 48 Penn. 386; *Perry* v. *Scott*, 51 Penn. 124.

E. S. Marsh and *Button & Button* for the plaintiff.

Where the terms of a written contract are equivocal, resort may be had for its interpretation to the construction put upon it by the parties, as evidenced by possession and other similar acts. *Gray* v. *Clark*, 11 Vt. 583; *Barker* v. *Troy & R. R. Co*, 27 Vt. 766.

START, J. The action is ejectment, and the plaintiff seeks to recover the possession of a cottage, and the damages for its detention. On the 29th day of April, 1895, the plaintiff was the owner of the cottage and the land on which it stood; and on that day the parties entered into an agreement in writing, under seal, whereby the plaintiff agreed to convey the cottage, the land on which it stood, a hotel and certain personal property, to the defendant. The defendant agreed to convey certain real estate to the plaintiff, and, among other things, thereby agreed that he would allow the plaintiff to occupy the cottage, free of rent, for the period of three years. The deed conveying the property was delivered pursuant to the plaintiff's agreement; and the defendant occupied the cottage during the season thereafter by permission of the plaintiff, the following season without permission, and refused to vacate the same on demand.

The plaintiff, by giving the defendant permission to occupy the cottage the first season, and the defendant, by occupying under such permission, have given a construction to the written agreement and the plaintiff's deed. The parties having acted under such construction, and the defendant having gone into possession under a license from the plaintiff, which has terminated by its own limitation, in

determining their respective rights to the cottage, it is unnecessary to consider whether the agreement respecting personal property has been performed. The case shows, that their respective undertakings had been so far performed that the defendant went into possession by the plaintiff's permission and thereby, in effect, became the plaintiff's tenant; and that the defendant held possession after the term for which he had permission to occupy had expired, and after a surrender of the cottage had been demanded. This was all that was necessary. From this showing, it is clear that the parties understood from their written agreement and the deed that the plaintiff was entitled to the possession and control of the cottage for the term of three years from the date of the written agreement. It is also clear that the parties, in arriving at this understanding, construed the written agreement and the deed together, and, in thus construing them, gave them their legal effect; and that they acted upon such construction,—the plaintiff, by giving the defendant permission to occupy the cottage the first season, and the defendant, by going into possesion under the permission of the plaintiff and thereby becoming the plaintiff's tenant. The defendant being such tenant, cannot, under the circumstances, deny the plaintiff's right to possession at the expiration of the term for which permission to occupy was given.

Under these circumstances, the agreement and deed may, and should, be read together. When so read, it is obvious, that, under them, the defendant's right of occupancy of the cottage was suspended for the term of three years from the date of the written agreement; and that, during that term, the plaintiff was entitled to the exclusive possession and control. When we read the written agreement and deed together, and treat them as one transaction, as the parties have done, the case stands no different from what it would if the deed contained a clause reserving to the plaintiff the possession and control of the cottage for the term of three

years. While the plaintiff owned the cottage, he had the possession and control of it. When he parted with his title, he, in effect, reserved that possession and control for the term of three years; and the defendant's right to occupy the cottage, as against the plaintiff, was suspended for that term. Therefore, his right of occupancy during that term rests solely upon the plaintiff's subsequent permission that he might do so during the first season. This was a mere license to occupy, which expired by its own limitation, and when it expired the plaintiff was entitled to the possession of the cottage. The defendant's possession, after a demand for its surrender, was without right, as against the plaintiff; and the plaintiff may, under V. S. 1487, maintain his action of ejectment, and, under V. S. 1490, recover according to the right thus shown.

Judgment affirmed.

JAMES F. BELLOWS *vs.* EDWARD A. SOWLES and Tr.

October Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER and THOMPSON, JJ.

Opinion filed February 3, 1899.

Pleading.—A declaration in debt on a judgment is not bad for being inappropriately introduced with the words, "in a plea of the case."

Pleading.—"Which judgment remains in full force and unsatisfied in part, to wit, for the sum of $8,123.17," is a sufficient allegation that the judgment is unsatisfied.

Execution—Levy—Satisfaction.—The mere levy of an execution on lands does not operate as a satisfaction; and an execution is not inadmissible in evidence in an action of debt on the judgment merely because the return shows that such a levy was made and the execution returned unsatisfied.

Alias Execution.—An execution which commands the officer to collect "fifty cents for a former writ," shows on its face that it is an *alias*.

Evidence.—Inasmuch as the defendant claimed that the judgment had been satisfied by an arrangement between the defendant and the judgment plaintiff, it was proper for the plaintiff to show that the judgment had been assigned to others, the real plaintiffs in this action, with notice to the defendant.

Exception—Waiver.—The introduction of evidence by the defendant, after his motion for a judgment had been overruled, was a waiver of his exception to the ruling.

Exception—Waiver.—When there is no exception to a finding of fact on the ground that there is no evidence to support it, a judgment based upon that finding is not subject to exception on the ground that the finding makes the judgment too large, especially where the excepting party has chosen to stand by and see an incorrect judgment entered.

DEBT on judgment. General issue, pleas in bar, replication and rejoinder. Trial by court at the March term, 1898, Franklin county, *Munson*, J., presiding. Judgment for plaintiff. Defendant excepted.

Edward A. Sowles for the defendant.

Wilson & Hall, Ballard & Burleson and *Farrington & Post* for the plaintiff.

THOMPSON, J. (1) The defendant insists that this action cannot be maintained because, as he says, the plaintiff has declared in case instead of debt. As this is an action to recover the amount due on a judgment of the county court, it is true that debt is the proper form of action. Although in the copy of the writ furnished this court, the count begins with the words, "in a plea of the case," yet what follows is a declaration in debt on a judgment, and such misnomer does not change its character, and it is to be held to be what it is in fact, and not what the pleader may have inadvertently called it. *Cogswell* v. *Baldwin*, 15 Vt. 411.

(2) There was no variance between the record of the judgment admitted in evidence and the judgment described in the declaration.

(3) To the admission of the execution issued on the judgment in suit, the defendant excepted on the grounds, that the declaration did not sufficiently allege that the

judgment was unsatisfied, and because the officer's return shows a levy on real estate and no further action upon his part, and because such return is insufficient.

The declaration sufficiently alleges that the judgment was unsatisfied. Its language is, "which judgment remains in full force and unsatisfied in part, to wit, for the sum of $8,123.17." The fact that the return showed a levy on real estate and nothing more, and that the execution was returned unsatisfied, did not render the execution inadmissible. The mere levy of an execution on lands does not operate as a satisfaction of such execution. Freeman on Executions, § 282; 7 Am. & Eng. Ency. Law, 157. There was no error in admitting this execution. Nor was it error to admit in evidence the *alias* execution. It showed on its face that it was such an execution, by the command therein to collect "fifty cents for a former writ." It was also competent to receive the testimony of Wilbur P. Davis, the clerk of the court, to identify this execution.

(4) If it were error, which we do not decide, to admit evidence in respect to the agreement between the plaintiff and Osman F. Bellows to share equally the avails of their respective suits against the defendant, it was harmless error, as it could in no way affect the finding of the court in respect to any fact material to determine the rights of the parties to this suit.

(5) It was admissible to show the assignments, of which defendant had notice, by which Wilson & Hall, Farrington & Post and George A. Ballard, became the real plaintiffs in interest, especially in view of the claim by the defendant that the judgment had been satisfied by an arrangement between him and James F. Bellows, the plaintiff of record.

(6) The introduction of evidence by the defendant, after his motion for a judgment in his favor had been overruled, waived his exception to this ruling. He also contends that his exception to the rendition of final judgment should now be sustained on the ground that the judgment was $1.60

too large. There was no exception to the finding of facts on the ground that they were unsupported by evidence. The final judgment was for the amount named in the finding of facts, which must be taken to be conclusive as to the sum due. Were it conceded that the judgment is $1.60 too large, it would not avail the defendant. A party cannot stand by in the county court and suffer it to enter judgment on what he knows to be an erroneous verdict or finding of facts, and not call the attention of the court to the error in any way so that it may be corrected, and then be heard to impeach the judgment for errors which he knew existed, and which he might have had corrected by calling the attention of the county court to them. *Wilson* v. *Blake*, 53 Vt. 305.

It having been found that the judgment in suit had not been satisfied as claimed by the defendant, the plaintiff was entitled to a judgment on the facts found.

Judgment affirmed and cause remanded to be proceeded with as to trustee.

RE IRA BARNEY'S WILL.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed June 14, 1899.

Opening Statement.—It is error to permit counsel, in his opening statement to the jury, to refer to the result of a former trial as evidence that his opponents would not be able to substantiate their present claims.

Bogus Signatures—Collateral Issues.—Witnesses upon the stand, whose signatures as witnesses to the contested will are claimed to have been counterfeited, should not be shown bogus signatures of their own names and asked if they would consider them genuine. Such bogus signatures are inadmissible as raising a collateral issue, and the rule is not to be relaxed even in cross examination.

Unnatural Will—Evidence.—When it is claimed that a will is unnatural in failing to provide for needy relatives, it may be shown by way of explanation that the testator entertained unfriendly feelings towards the husband of one such heir and towards the son of another.

Cross-Examination—Collateral Issues.—The proponent, who was a lawyer, drew the will in question, by the terms of which he would receive the whole property after a life estate in the widow, and being upon the stand, was asked in cross-examination whether he did not understand when he drew the will that by the law of Rome such an instrument was void. *Held*, error to permit the question.

Declarations as Evidence of Mental State.—The proponent having claimed that the testator was at a certain period happy and contented, the contestants were properly allowed to show the testator's own declarations to the contrary.

Exception to Charge.—Exception was taken to the charge in that it stated that certain facts were suspicious and cast upon the proponent the burden of proof; but as the charge is not before this court, it is inferred that the jury were elsewhere instructed, that the facts were subject to explanation and that it was for the jury to say whether and how far a given fact was suspicious.

What Papers May Go to the Jury.—Although what papers shall go to the jury is largely matter of discretion, inadmissible papers are never to be submitted.

APPEAL from a decree of probate court allowing an instrument as the last will of Ira Barney. Pleas, defective execution, incapacity, undue influence and fraud. Trial by jury at the September term, 1898, Chittenden county, *Ross*, C. J., presiding. Verdict and judgment for the contestants. The proponent excepted.

The proponent, Charles F. Barney, is a grand nephew of the testator, is a lawyer, and himself drew the will. The contestants are all the lawful heirs of the deceased except the proponent's father. The will bequeaths all the testator's property to the proponent after a life estate in the testator's widow. The widow, the proponent and the proponent's father are named as executors. The case had been tried once before, resulting in a verdict in favor of the will and the judgment had been reversed in the supreme court upon the contestants' exceptions, and a new trial ordered. 70 Vt. 352. At the beginning of the present trial, counsel for

the proponent made an opening statement to the jury of such facts as his testimony would tend to establish, in reply to which counsel for the contestants remarked that unless the proponent succeeded better in his proof than he did on the former trial, he would not be able to substantiate the facts stated. To this remark the proponent seasonably excepted.

The contestants, under exception, were permitted to ask the proponent in cross-examination whether he did not know at the time he was called upon to draw the will that by the Roman law such a will would be void as to the drawer of it, and replied that he did.

Seneca Haselton, *D. J. Foster* and *Charles T. Barney* for the proponent.

The remark of counsel in his opening statement was exceedingly prejudicial, and the more so for being contrary to fact; the former verdict was in favor of the will. Such remarks are ground for reversal. *Goldthorpe* v. *Goldthorpe*, 77 N. W. 471; *Noble* v. *Portsmouth*, 30 Atl. 419; *Conn* v. *State*, 11 Tex. App. 399; *Perkins* v. *Burley*, 64 N. H. 524: 15 Atl. 21; *Evans* v. *Trenton*, 112 Mo. 390; *State* v. *Clouser*, 72 Iowa 302: 33 N. W. 686; *Estes* v. *Bridgforth*, 114 Ala. 221: 21 So. 512; *Purdy* v. *Hall*, 134 Ill. 298: 25 N. E. 645; *State* v. *Cater*, 100 Iowa 501: 69 N. W. 880, 884; *Jones* v. *State*, 89 Ind. 82; *Robertson* v. *Madison*, 29 Atl. 777; *Bullard* v. *R. Company*, 64 N. H. 27: 5 Atl. 838; *Scripps* v. *Reilly*, 35 Mich. 371: 24 Am. Rep. 575; *Brown* v. *Swineford*, 44 Wis. 282: 28 Am. Rep. 582; *Cleveland Paper Co.* v. *Banks*, 15 Neb. 20: 48 Am. Rep. 334; *Gibson* v. *Zeibig*, 24 Mo. App. 72; *State* v. *Fitzgerald*, 68 Vt. 125; *Cutler* v. *Skeels*, 69 Vt. 154; *Ranchau* v. *R. Co.*, 71 Vt. 142.

The inquiry as to the civil law was inadmissible. *Merrill* v. *Noyes*, 10 Allen 416; *State* v. *Smith*, 6 R. I. 33; *Harris* v. *State*, 24 Neb. 803; *Newkirk* v. *State*, 27 Ind. 1; *State* v. *Hannett*, 54 Vt. 83, 89.

The bogus signatures were inadmissible. *Rowell* v. *Fuller*, 59 Vt. 688; *Spottiswood* v. *Weir*, 66 Cal. 525; *Com.* v. *Eastman*, 1 Cush. 189; *Com.* v. *Jeffries*, 7 Allen 562; *Cohen* v. *Teller*, 93 Pa. 123; *Thomas* v. *State*, 18 Tex. App. 213; *McKeone* v. *Barnes*, 108 Mass. 344; *Thayer* v. *Chesley*, 55 Me. 393; *Doud* v. *Reid*, 53 Mo. App. 553; Chase's Stephen's Evidence, 155 note (ed. '98); *Gaunt* v. *Harkness*, 53 Kan. 405; *Rose* v. *Bank*, 91 Mo. 399: 3 S. W. 876; *Andrews* v. *Hayden*, 11 S. W. 428: 88 Ky. 455; *Tyler* v. *Todd*, 36 Conn. 218; *Massey* v. *Bank*, 104 Ill. 327; Rogers Exp. Tes. 204.

Evidence should have been admitted to show the testator's feelings towards the husband and son of excluded heirs. In *Re Hine*, 37 Atl. 384 (Ct.); *Re Cahill's Estate*, 36 Atl. 563: 180 Pa. St. 131; *Whitman* v. *Morey*, 2 Atl. 899: 63 N. H. 448; *Estes* v. *Bridgforth*, 21 So. 512: 114 Ala. 221.

W. H. Bliss, *F. B. Deberville* and *R. E. Brown* for the contestants.

Exception 1 is frivolous. There was nothing improper in the remark cited, taken in connection with the opening statement of counsel for proponent. The charge as to burden of proof was bound to be the reverse of what it was in the former trial, and evidence then sufficient would not be sufficient now. *Re Barney's Will*, 70 Vt. 352, 371. There was no ruling of the court on the question of the propriety of the remark. Exceptions of this kind are frequent of late and in most cases are untenable. *State* v. *Warner*, 69 Vt. 30; *Bagley* v. *Mason*, *Ibid*, 175; *McMullin* v. *Erwin*, *Ibid*, 338; *Guiltinan* v. *Insurance Co.*, *Ibid*, 469; *Amsden* v. *Atwood*, *Ibid*, 527; *Re McCabe*, 70 Vt. 155; *State* v. *Marsh*, *Ibid*, 288; *Billings* v. *Insurance Co.*, *Ibid*, 477.

These exceptions have arisen in nine cases in the last two volumes of Vermont Reports and have been sustained in only one, *Cutler* v. *Skeels*, 69 Vt. 154, when the counsel

stated and iterated pertinent facts of which there was no evidence.

It was proper to inquire, on cross-examination, of the proponent, to learn whether he realized how dangerous it was for him to draw this will in his own favor, as bearing upon the question whether he did not have to draw it himself in order to have it in his own favor. Whatever may be said of the quality of his answer as a lawyer, it could not have prejudiced his rights before the jury. But if it had it was legitimate cross-examination of a party. 1 Greenl. on Evidence, §§ 446–450.

The ruling was at least within the discretion of the court. See cases cited in note 2, p. 320, Stephen's Digest of Ev., 2d Am. Ed. Also, pp. 321-2-3-4.

TAFT, C. J. (1) The remark of the contestants' counsel in his opening statement to the jury was improper. It was not in line with what an opening statement should be, viz: —a statement of the issues in the case, and the facts proposed to be shown, to enable the jury to better understand the testimony as it is given. A lengthy statement is never necessary and an argumentative one improper. A discussion of whether the adverse party will or will not be able to substantiate the facts as claimed by him is not a legitimate opening statement. It is a fact which can only be determined by the result of the trial, and the opinion of counsel in respect to it, is illegitimate. It cannot be said in this case that the remark was harmless for the trial began with the statement of counsel that upon a former trial of the case the verdict or result of the trial was against the will. We cannot say that it had no effect upon the minds of the jurors. It may have prejudiced them against the will.

(2) The contestants claimed that the signatures on the alleged will, from the translucency of the paper, might have been transferred thereto by tracing; and bogus signatures of two of the witnesses whose names appear on the instrument as attesting witnesses, and of the alleged

testator, were admitted in evidence; and the two witnesses were permitted to testify that if shown the bogus signatures and not told they were counterfeit, they might have thought they were genuine. This testimony was taken under objection and exception. The bogus signatures presented a collateral issue, and should not have been admitted, nor the witnesses questioned in respect to them. That the rule is not to be relaxed in favor of a cross-examination is equally clear and has been many times held by courts of last resort in England and the United States.

(3) The contestants claimed the will was an unnatural one and gave evidence tending to show the impoverished condition of some of the testator's heirs, and the friendly relations existing between him and some of them, as well as the financial circumstances of the proponent's mother who was not an heir of the testator. The testator had two nieces who were of his heirs and had he died intestate, each would have inherited one-sixteenth of his estate. Testimony tending to show unfriendly feelings towards the husband of one niece and a son of another was excluded. It might have been natural and reasonable for the testator to exclude an heir whose husband he disliked or to whose son he was hostile. It is difficult generally to divorce from one's mind the fact that the prosperity of one's wife or mother redounds in a pecuniary way to the benefit of the husband or son. Pecuniary injury resulting to persons standing in such relations is recognized by our statutes in actions for the death of a person caused by a wrongful act. It was error to reject the testimony.

(4) The proponent's knowledge of the Roman law at the time he drew the will was not an issue in the case, neither was it any part of his legitimate cross-examination. The testimony served to bring before the minds of the jury the fact that by the law of Rome, the will was void. If this was legitimate, his knowledge or ignorance of what the law of any other country was, would likewise be permitted and

so a multitude of immaterial collateral issues would be raised having no relevancy upon any of the questions before the jury. The admission of the testimony was error.

(5) A question is made as to the testimony of one Ward. The custom of the bank was inadmissible unless it was a general custom observed by all. The witness claimed he was not an expert, but contestants' counsel made him one, and obtained his testimony, and then objected to his cross-examination because he said he was not an expert, and the court, after permitting the examination in chief, excluded the cross-examination upon the ground that the subject was not one of expert testimony, and that the jury could judge of the matter as well as the witness. It is unnecessary however, to pass upon this question as the judgment must be reversed upon other grounds and the question will probably not again arise.

(6) The proponent put in testimony that during the summer of 1895, the year prior to his death, Ira Barney who then lived at Truman Barney's was well and jolly, very happy and contented, and that his mind seemed to be at peace. It was not error to permit contestants to prove his declarations tending to show the contrary. There was no better way of showing whether Ira was contented or discontented than by his declarations.

(7) This exception is waived.

(8) The proponent excepted to that part of the charge in which the trial judge stated the circumstances which cast upon the proponent the burden of proving by satisfactory evidence that the alleged will was the free and intelligent act of Ira Barney and that he fully understood its contents and effect. The charge of the court is not before us. The criticism upon that part of the charge above noted is that the jury were told that the facts above referred too were circumstances of suspicion which cast upon the proponent the burden, etc. We infer that the judge in the other parts of the charge properly instructed the jury that the circum-

stances were subject to explanation and whether any given fact was suspicious, or to what extent suspicious, was for the jury to say upon a consideration of the whole testimony in the case. In some cases any certain fact might have great weight against the validity of the will when in other cases it might have little or none at all.

(9) What papers should go to the jury is ordinarily and perhaps in all instances a matter of discretion in the trial judge, but inadmissible papers should never be sent to the jury. In permitting the bogus signatures to go, there was error.

Judgment reversed and cause remanded.

RE ELLEN B. SEGUR'S WILL.

October Term, 1898.

Present: ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed February 3, 1899.

Insane Delusion—Evidence.—If a testator has an insane delusion in respect to one of his children, or other natural object of his bounty, and the instrument presented for probate is the product of such delusion, it is void, notwithstanding he may have had capacity to do all kinds of business not involving such delusion. Hence, a charge is erroneous which instructs the jury that they may test the witnesses for the contestant by asking themselves whether such witnesses would have hesitated to do business with the testator.

Will not to Be Construed in this Case.—The question was whether the instrument propounded was the last will and testament of the deceased; and the county court should have refused to consider the question whether one clause in the instrument was void as against public policy, although such clause would dispose of the bulk of the estate.

APPEAL FROM PROBATE. Trial by jury at the May term, 1898, Windsor county, *Ross*, C. J., presiding. Verdict and judgment for the proponent. The contestant excepted.

This was an appeal from a decree of the probate court for the district of Hartford, allowing an instrument as the last will of Ellen B. Segur. The appellants objected upon four grounds: (1) defective execution; (2) incapacity; (3) undue influence; and (4) that one clause of the instrument was against public policy. The proponent traversed the first three pleas and filed a general demurrer to the fourth. The court ruled that the matters involved in the fourth plea should be determined by the court after the verdict on the first three. The trial then proceeded upon the first three pleas and a verdict was returned allowing the will. After verdict the court heard the questions arising under the fourth plea and the demurrer thereto, and sustained the demurrer and adjudged said fourth plea insufficient in that the clause referred to therein was not illegal or void as against public policy; to which ruling the contestant excepted.

W. E. Johnson and *Wm. Batchelder* for the contestant, argued upon the first point as the court holds, and upon the second point contended that inasmuch as substantially the whole property was sought to be disposed of under one particular clause of the will, which clause the contestant claimed to be void as against public policy, the court should consider and decide that question as well as the other, in the hope of avoiding a retrial of the cause.

Hunton & Stickney for the proponent.

THOMPSON, J. One issue on the trial below, was whether Ellen B. Segur, the testatrix, was of sound mind at the time she executed the will in question. The evidence of the contestant tended to prove that she was subject to insane delusions as to her acquaintances, friends and relatives, and that at such times she was unable to judge sanely in relation to the persons in respect to whom she held such delusions; and that she was laboring under such an insane delusion in regard to her son, the contestant, at the time she executed

the will sought to be established. On this branch of the case the jury were instructed, among other things, as follows: "Take the witnesses of the contestant or the witnesses of the proponent, any of them, would they have been at a loss to have dealt with her in regard to this property on the occasion she made this will, under the circumstances that she made it? That is a good way to test whether from all their testimony, and their judgment on it, where they give their judgment, that is, whether she was capable, competent or not competent, sound or unsound, testate or intestate. It is a good way to test their acts in comparison with what they say they consider her condition."

It must be taken that the testimony referred to in this instruction was relevant to the issue as to the will being the product of an insane delusion of the testatrix in respect to the contestant. By this instruction, the jury must have understood that if the witnesses considered the testatrix to be of such mental capacity that they would have dealt with her in regard to her property, then their testimony had no tendency to prove that she was laboring under an insane delusion as to the contestant and that the will in question was the product of such delusion.

Evidence of delusions is not necessarily countervailed by evidence of business capacity as to ordinary business transactions. The fact that a man is capable of transacting business, whatever its extent, or however complicated it may be, and however considerable the powers of intellect it may require, does not exclude the idea of his being of unsound mind. 1 Clevenger's Med. Juris. 297; *Morse* v. *Scott*, 4 Demarest 507; *Smee* v. *Smee*, L. R. 5 Prob. Div. 84; *Manley's Exr.* v. *Staples*, 65 Vt. 370; *Fraser* v. *Jennison*, 42 Mich. 231; *Rivard* v. *Rivard*, 109 Mich. 98: 66 N. W. Rep. 681; *Tawney* v. *Long*, 76 Pa. St. 106; *Taylor* v. *Trich*, 165 Pa. St. 586: 44 Am. St. 679 and note.

To have the capacity to make a will, a man must be able

to know the number of his children, or others, dependent upon his bounty, their deserts with reference to conduct and capacity, as well as need, and what he has before done for them relatively to each other, and the amount and condition of his property. *Converse* v. *Converse*, 21 Vt. 168. If he has an insane delusion in respect to one of his children, or other natural object of his bounty, and the instrument presented for probate is the product of such insane delusion, it is void, because he has not the testamentary capacity the law requires, and this is so, notwithstanding he may have had capacity to trade, and do all kinds of business, not involving such delusion. 11 Am. & Eng. Ency. Law 154; *Tawney* v. *Long*, 76 Pa. St. 106; *Taylor* v. *Trich*, 165 Pa. St. 586: 44 Am. St. 679 and note; *Lucas* v. *Parsons*, 24 Ga. 640: 71 Am. Dec. 147; 1 Redf. Wills (3d ed.) 69; *Seamen's Friend Society* v. *Hopper*, 33 N. Y. 619. The witnesses may have considered the testatrix competent to deal with them in respect to her property at the time she executed the will, and yet have truthfully testified that she was then possessed of an insane delusion as to the contestant, and their testimony tended to prove such delusion, although they would have dealt with her. Hence, viewed in this aspect of the case, this instruction was erroneous. If it is construed as giving a test by which the jury could determine whether the testatrix was under an insane delusion as to the contestant and whether the will was the product of such delusion, it follows from what has already been said, that it is also erroneous.

The construction of the alleged will was not before the county court, and consequently is not before this court. If the proposed instrument is established as the last will and testament of the testatrix, its construction will properly come before the probate court, when her estate is distributed by it, under the will, or when some question arises in that court requiring its construction.

Judgment reversed and cause remanded for a new trial.

ELIZA A. CHAPMAN et al *vs.* RICHARD LONGWORTH.

October Term, 1898.

Present: TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed February 9, 1899.

Deed—Description by Reference.—A deed which, in place of describing the premises conveyed, refers to a former deed for the description, is to be read as incorporating in itself the description contained in such former deed or in a still earlier deed to which the references run back.

Deed—Repugnant Provision Void.—A deed which in itself or by reference to an earlier deed describes the granted premises by exact metes and bounds must be held to pass the grantor's title to the land described, although in a subsequent clause it states that for the same consideration the grantor conveys to the grantee "the use of the lane as it now is for the convenience of getting to and from the premises hereby conveyed," said lane extending across and forming a part of the land first described, for the latter clause being repugnant to the granting clause of the deed is void.

Essentials to the Beneficial Use.—The finding of the referee that the lane was essential to the use of the pasture and formed a part of it brings the case within the rule that everything essential to the beneficial use and enjoyment of the property designated is to be considered, in the absence of excepting clauses, as passing with the grant.

TRESPASS ON THE FREEHOLD. Heard on the report of a referee, May term, 1898, Windsor county, *Ross*, C. J., presiding. Judgment for the defendant to recover his costs. The plaintiffs excepted.

W. W. Stickney, *J. G. Sargent* and *E. B. Flinn* for the plaintiffs.

Gilbert A. Davis and *W. B. C. Stickney* for the defendants.

TYLER, J. On June 20, 1859, Charles Holt, being the owner of a tract of about eleven acres of land situated in Springfield, on that day conveyed ten acres and twenty square rods of the same to John Gould, and the remainder, being one acre and five square rods, to Isaac Howe. On

November 16, 1859, Gould conveyed his tract to John Tolles, who, on April 1, 1870, conveyed it to Mary W. Knight, who, on June 1, 1872, conveyed it to Isaac Howe, so that Howe, on the latter date, became the owner of the tract which Holt had severed by his deeds of June 20, 1859. The larger tract was pasture land and was conveyed by Howe to the plaintiff, Eliza A., on May 15, 1893. The description in the deed is as follows:

"Being all and the same premises conveyed by deed from Mary W. Knight to the said Isaac Howe, dated January 1, A. D. 1872, and recorded in Book 20, Page 578 of Springfield land records, to which reference may be had for a more particular description; hereby reserving from said land conveyed as aforesaid by said Mary W. Knight about two acres, be the same more or less, that the said Isaac Howe has fenced off from the easterly end of said land; and also reserving any springs of water and privileges connected therewith that may have been conveyed by former deeds at the time of the conveyance from Mary W. Knight aforesaid, or that may have since heretofore been conveyed by the said Isaac Howe, including a deed this day executed by said Isaac Howe to the executors of H. H. Spafford's estate; and the said Isaac Howe reserves the use of the premises hereby conveyed for the purpose of pasturing during the season of pasturing for this present year. The premises hereby conveyed contain about eight acres, be the same more or less; and for the consideration aforesaid the said Isaac Howe conveys to the said Eliza A. Chapman the use of the lane as it now is for the convenience of getting to and from the premises hereby conveyed."

In the deed from Knight to Howe the land conveyed has no other description than that it is the whole of the land which Tolles conveyed to her, and the same is true of the other conveyances running back to the deed of June 20, 1859, from Holt to Gould, in which the pasture and lane are carefully bounded and described. No question now

arises in respect to their identity. This description must be read into Howe's deed to the plaintiff. *Lippett* v. *Kelley*, 46 Vt. 516; *Clement* v. *Bank of Rutland*, 61 Vt. 298. The latter deed conveys the same land, with the exception of the two acres fenced off, that Holt conveyed to Gould, and is the tract shown in the plans, with a lane extending in an easterly direction therefrom to Union street.

The referee finds that the two acre piece, taken by Howe from the Knight pasture after he purchased the premises, was enclosed with his meadow, that he built the wall on the north side of this piece, which was also on the south side of the one-rod strip, and thus extended the lane westerly to the pasture. The referee's report makes it clear that the lane was not included in the two acres reserved, but was north of and separate from it.

The only question is upon the construction that shall be given to the plaintiff's deed in respect to the lane. There would be no question were it not for the last clause in the description granting the use of the lane.

It is true that when there is ambiguity in a deed the instrument must be construed so as to carry out the intentions of the parties. By what is called in the deed a *reservation* of two acres, but which was an *exception* from the terms of the grant, it evidently became necessary to extend the lane westerly along the north side of the excepted piece, for there was no occasion for a lane there before that piece of land was turned into the meadow. The deed in respect to that part of the lane has no ambiguity. It expressly conveys all of the pasture excepting the two acres that had been fenced off.

In all the deeds, from that of Holt to Gould in 1859, down to that of Knight to Howe in 1872, the conveyance of the lane was as absolute and clear in its terms as that of the pasture itself. It had been used by the different owners of the pasture in driving cattle to and from it and was necessary for that use. The deed from Howe to the plaintiff

is like the others, aside from the exception of the two acres, and the springs of water, and the final clause in the description above quoted, granting a use.

In 1895 the executrix of Howe's will conveyed the Howe premises to one Buss, who took down the fence and bars, whereupon Mr. Chapman rebuilt them in the place where they were when his wife took her deed, and litigation ensued. In 1896 the defendant bought the Howe premises, after which he removed the post and bars fifteen times and the plaintiff and her husband replaced them. The defendant's acts have led to this suit.

We think that the deed from Howe to the plaintiff must be construed to convey the fee in the lane. The precise description in Holt's deed to Gould, which must be considered as copied into the plaintiff's deed, identifying the land by metes and bounds, courses and distances, must prevail over the conveyance of a use in a later part of the premises. The grant of the fee is in clear and unambiguous terms, while the grant of the use may mean the use of the entire lane from the pasture to the street, or possibly only that part of it which lies north of the two acre piece. The clause giving the use cannot control the grant of the fee. The grant of the easement cannot have the effect to limit the grant to an easement.

A grantor cannot destroy his own grant, however much he may modify it or load it with conditions. Having once granted an estate in his deed, no subsequent clause, even in the same deed, can operate to nullify it. Devlin on Deeds, § 838a, citing *Maker* v. *Lazell*, 83 Me. 562: 23 Am. St. 795.

A deed made pursuant to a sale on execution, conveying all the right, title and interest of the judgment debtor in land specifically described, contained the phrase, "being a leasehold unexpired, originally granted." It was held to pass the fee, the execution debtor being in fact the owner at the time of the sale, the recital as to a leasehold interest not having the effect of limiting the estate conveyed. *Dodge* v. *Walley*, 22 Cal. 224, cited in note to Devlin on Deeds, § 838a.

Repugnancy is a disagreement or inconsistency between two or more clauses of the same instrument. In deeds and other instruments *inter vivos*, the general rule is that the earlier clause prevails if the inconsistency be not so great as to avoid the instrument for uncertainty. 21 Am. & Eng. Enc. 20; 2 Bouv. Law Dict. 578. In *Doe, ex dem. Leicester*, 2 Taunt. 109, *Mansfield*, Ch. J., said, ... "the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail." It was held in *Cutler* v. *Tufts*, 3 Pick. 272, that where the descriptive words are wholly without ambiguity, and are followed by a clause repugnant, the second clause must be rejected.

The fact found by the referee, that the lane was essential to the use of the pasture, and formed a part of it, brings the case within the rule that everything essential to the beneficial use and enjoyment of property designated, in the absence of excepting clauses, is to be considered as passing with the grant, as in *Snow* v. *Orleans*, 126 Mass. 453, where it was held that a deed conveying "the academy with the fence around said building," conveyed the land about the building, used in connection with it, as well as the building itself. *Sheets* v. *Selden's Lessee*, 2 Wall. 177; Shep. Touch. 94.

Greater force should not be given to an inconsistent clause in the description in a deed than is given to a *habendum*, which is contradictory to the premises. Chancellor *Kent* says, 4 Com. 468, that the *habendum* cannot perform the office of divesting the estate already vested by the deed; that it is void if it be repugnant to the estate granted. See *Cong. So.* v. *Stark*, 34 Vt. 243; *Flagg* v. *Eames*, 40 Vt. 16.

In *Alger* v. *Kennedy*, 49 Vt. 109, the description was, "the premises on the corner of College street and Center street recently occupied by E. Laporte as a French hotel." In the discussion of the case in the opinion these rules were clearly brought out: . . . "a particular description,

following closely in the same sentence and clause words of general description, is to be construed as a restriction or limitation of the general description."

. . . . . .

"When following a definite description, or when repugnant to a preceding description, or when manifestly added by way of further description, different rules of construction, and different considerations control the effect to be given them."

The case of *Robinson* v. *R. R. Co.*, 59 Vt. 426, upon which the defendant relies, falls under the first of these rules. There the description was, "being a strip of land four rods in width across my land, and being the same land now occupied by the St. Albans & Richford Plank Road Co. for their road," to which was added after a comma, the clause, "for the use of a plank road;" and it was held that this clause was a limitation upon the grant, and that only an easement was conveyed. The case at bar clearly falls within the second rule. The grant of the use of the lane is contained in an independent sentence in the premises of the deed, with several distinct reservations "from said land conveyed" standing between it and the absolute conveyance of the fee. We think that the latter grant must be held repugnant to the former one.

The defendant contends that the situation of Howe's buildings when he made the conveyance to the plaintiff and the necessity and convenience of having access to the north side of them, considered in connection with the language of his deed to the plaintiff respecting a use, render it incredible that he should have intended to convey the fee of the lane.

The intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then giving effect to such intention, if practicable, when not contrary to law. The intent, when clearly expressed, cannot be altered by extraneous circumstances. No positive rule of law can be

lawfully violated in the search for intent. Devlin on Deeds, §§ 835, 838, 840.

The referee has reported the facts fully, but there is no ambiguity in the deed to require extrinsic evidence to aid in its construction. The plaintiff's deed from Howe conveyed the fee in the lane, as the lane is described in Holt's deed to Gould.

In the view of the case that we have taken upon the main question, it is unnecessary to consider the question of estoppel by a former judgment.

Judgment reversed and judgment on the report for the plaintiff.

STATE OF VERMONT *vs.* BRADFORD SAVINGS BANK AND TRUST COMPANY, JAMES B. HALE, Receiver.

October Term, 1898.

Present: ROSS, C. J., ROWELL, TYLER and THOMPSON, JJ.

Opinion filed February 3, 1899.

Franchise Tax—V. S. 583.—The tax assessed by V. S. 583 against every savings bank and trust company incorporated in this State "and doing business herein," upon the average amount of its deposits after certain deductions, is a franchise tax, and the right to lay it is measured in point of time by the exercise on the part of the corporation of the rights and privileges essential to the operation of its business. Therefore, while the corporation is enjoined from transacting business, on the petition of the state inspector of finance, and a receiver is winding up its affairs, it is not doing business, within the meaning of the statute, and is relieved from the payment of the tax.

Costs.—Unless allowed by statute, costs are not recoverable against the State.

PROCEEDINGS instituted by the commissioner of state taxes, upon permission of the chancellor, to determine the

liability of the defendant for certain taxes. Heard upon an agreed statement of facts, at the September term, 1898, Chittenden county, *Ross*, C. J., presiding. The court rendered a *pro-forma* judgment for the defendant to recover its costs. The plaintiff excepted.

D. J. Foster, commissioner of state taxes, for the plaintiff.

The tax in question is a property tax, although the amount of such property is determined by the amount of deposits.

The statute levies the tax so long as the corporation continues to do business. This corporation is still doing business. The appointment of a receiver does not dissolve the corporation nor in any way interfere with its existence. If the bank was winding up its affairs through its officers, no question could be made as to the fact that it was "doing business." In point of fact, it is winding up its affairs through the agency provided by law. *Dewey* v. *St. Albans Trust Co.*, 56 Vt. 476; *Gibbes* v. *Greenville R. Co.*, 17 S. C. 403: 12 Am. & Eng. R. R. Cases 429.

Since then the corporation is still in existence, since it holds property which it is bound to distribute among its depositors, and since it is, through the proper agency, preparing so to do, and therefore doing business, it matters not whether the tax in question be deemed a franchise or a property tax.

John H. Watson for the defendant.

THOMPSON, J. The defendant is a savings bank and trust company incorporated by this State, and for some years prior to the first day of February, 1898, was doing business at Bradford, in Orange county. It was assessed and paid taxes to the State, as required by §§ 583 and 584 of the Vermont Statutes, up to January 1, 1898. On the first day of February, 1898, the inspector of finance, having ascertained, as he believed, that the defendant was insolvent, made application to the court of chancery for an injunction

against it and its officers, and such proceedings were had thereon that on the day last aforesaid an injunction was issued by the court and James B. Hale was appointed receiver to take charge of the property and effects of the defendant. Said suit is entitled, Hosea Mann, Inspector of Finance *v.* Bradford Savings Bank and Trust Company, and is still pending in the court of chancery in said county. Since the issuing of the injunction and the appointment of the receiver, the defendant has not been doing business in this State or elsewhere, beyond what has been done by the receiver, and he has done no business except to proceed in the winding up of the affairs of the defendant, as provided in §§ 4054 to 4064, inclusive, of Vermont Statutes, under orders of the court of chancery. For the purposes of this suit, it is agreed that the assets of the defendant are less than its liabilities.

The commissioner of state taxes has furnished the receiver with the necessary blanks to be filled out and returned for a basis of taxation as provided in chapter 31, Vermont Statutes, but the receiver has refused and does refuse to fill out and return the same, claiming that the defendant is not subject to such taxation, and particularly not after said injunction was issued and its affairs went into the hands of the receiver. No one but the receiver and a clerk employed by him have access to the books of the defendant. By the terms of the injunction, it was enjoined from transacting any business as such Savings Bank and Trust Company, or in its behalf.

Chapter 31 of Vermont Statutes, being §§ 547 to 594, inclusive, is entitled, Taxation of Corporations. Section 547 is as follows: "A State tax for the payment of State expenses is hereby assessed upon the property, business or corporate franchises of this State, of railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car and transportation companies, sleeping-car companies, savings banks, savings institutions and trust companies, mortgage,

loan or investment companies, and other corporations and persons, associations, societies or firms, as provided in this chapter, and shall be payable in money to the state treasurer for the use of the State."

Section 583 is as follows: "Every trust company or savings bank and trust company incorporated by this State, and doing business herein, shall pay a tax to the state treasurer, which is hereby assessed, at the rate of seven-tenths of one per cent. annually, upon the average amount of its deposits, including money or securities received as trustee under order of court or otherwise, deducting therefrom the average amount, if any, of its capital and accumulations invested in United States government bonds, also, the average amount of the assessed valuation of the real estate owned by such corporation, and also the amount, if any, of individual deposits in excess of fifteen hundred dollars each, listed to the depositors in towns of this State where such depositors reside."

Section 584 provides that "the taxes assessed by the preceding section shall be paid semi-annually, one-half in the month of February and one-half in the month of August, and shall be based upon the returns for the six months terminating with the last day of December, and June next preceding. No other tax shall be assessed on such deposits or accumulations in savings banks, nor on such deposits in trust companies, and savings banks and trust companies, nor against the depositors on account thereof, except individual deposits exceeding in the aggregate fifteen hundred dollars."

No question is made in regard to the right of the legislature to tax corporations of this kind in this way, but it is claimed that the tax assessed by said § 583 is a franchise tax, and that the right to thus tax is measured, in point of time, by the exercise, on the part of the Bradford Savings Bank and Trust Company, of the rights and privileges essential to the operation of the business, to

carry on which it was incorporated, by actually doing business in this State, and that it ceased to be doing such business within the meaning of this section, February 1, 1898, when it was enjoined, and consequently is not liable to pay this tax while its present status continues.

In *Provident Institution* v. *Massachusetts*, 6 Wall. 611, the United States supreme court, speaking by Mr. Justice *Clifford*, said: "Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the state treasury. They differ from property taxes, as levied for state and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection, and they are in lieu of all other taxation, state or municipal. Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter." In that case, it was held that a tax based upon the average amount of deposits was a franchise tax. Such has also been the holding of the courts in *Society for Savings* v. *Coite*, 6 Wall. 594; *State of Maryland* v. *Central Savings Bank*, 67 Md. 290; *Jones* v. *Winthrop Savings Bank*, 66 Me. 242; *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493; *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen 428. In the case at bar, the tax is levied directly by an act of the legislature and is payable into the state treasury. It is not levied upon the property of the bank, which must consist of chattels, money, notes, stocks, bonds and other evidences of indebtedness, or real estate. The amount of its deposits shows the indebtedness of the corporation to its depositors, and does not necessarily bear any relation to the actual value of its taxable property. There is no assessment of property to ascertain its value in comparison with the value of other

taxable property in the community. The amount of the tax is determined solely by the extent of the business of the corporation as measured by the average amount of its deposits for the time for which the tax is assessed, after making the deductions specified. On authority and reason, it is clear that it is a franchise tax, and V. S. 547 makes it clear that it was intended to be such a tax.

This view is also harmonious with the limiting words, "and doing business herein," in § 583. These words must be construed to have reference to the ordinary business of the corporation, conducted by itself under its corporate powers. *Commercial Bank* v. *Sherman*, 28 Oregon 573: 52 Am. St. 811; *Florsheim, etc., Co.* v. *Lester*, 60 Ark. 120: 46 Am. St. 162; *American Glucose Co.* v. *New Jersey*, 43 N. J. Eq. 280; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727. When the Bradford Savings Bank and Trust Company was enjoined from doing business in the suit instituted by the state inspector of finance, it ceased to transact its ordinary business or any other, and ceased to be doing business in this State within the meaning of § 583, and consequently ceased to be liable to pay this franchise tax.

The judgment below was for the defendant to recover its costs. Unless allowed by statute, costs are not recoverable against the State. We have no statute permitting their recovery.

Pro-forma judgment for the defendant reversed. Judgment for the defendant without costs.

MINER & HILL *vs.* AVERY D. PIKE'S ESTATE.

October Term, 1898.

Present: ROSS, C. J., TAFT, ROWELL, TYLER, START and THOMPSON, JJ.

Opinion filed February 3, 1899.

Evidence.—Without deciding whether payment of all book charges for one year would, standing alone, be evidence tending to show that all previous charges had been paid, it is *held*, that such payment in the circumstances of the present case was properly treated as evidence of that fact.

APPEAL FROM PROBATE. Declaration in general assumpsit. Trial by court, at the June term, 1898, Caledonia county, *Munson*, J., presiding. Upon the facts found by the court judgment was rendered for the plaintiff for $22.45, with interest, to which the plaintiff excepted.

Dunnett & Slack for the plaintiffs, cited, *Sennett* v. *Johnson*, 9 Pa. 335; *Bougher* v. *Kimball*, 30 Mo. 193; *Mechanics Bank* v. *Wright*, 53 Mo. 155.

Farnham & Porter for the defendant, cited *Mathews* v. *Light*, 40 Me. 397; *Brewer* v. *Knapp*, 1 Pick. 332; *Decker* v. *Livingston*, 15 Johns. 479; *Hodgdon* v. *Wight*, 36 Me. 326; *Attleborough* v. *Middleborough*, 10 Pick. 378; 1 Green. Ev. § 38.

THOMPSON, J. The plaintiffs claimed to recover certain items of account for materials and labor furnished the deceased from November 18, 1887, to August 14, 1896. These items, aggregating over one hundred in number, are charged on plaintiffs' books, which were kept in journal form. In some instances the items of charge are marked "paid" on the margin of the book, and those not so marked, ordinarily have a mark indicating posting. Four items which accrued in 1892 and which were paid June 7,

1892, are not marked "paid," but are marked as posted. Two other items which accrued in May, 1894, and were paid the same month, which are not included in plaintiffs' specifications, are not marked "paid," nor with usual indication of posting. The plaintiffs rendered the deceased a bill covering the charges for 1895, which consisted of twelve items of charge and two of credit, and on which they acknowledged receipt of payment under date of February 29, 1898. In their books covering the transactions of 1896, appears in regular order with the usual marks of posting, the following entry: "Mon., Mar. 2, 1896. A. D. Pike, Cr. By cash to bal. his account for the year 1895." No amount is carried out. The last preceding date is February 25, and the first succeeding one is March 5. The payment was in fact made. The plaintiffs conceded that the amount shown by the specifications to be due prior to 1895, should be reduced by twelve dollars, the amount of taxes paid for the plaintiffs by deceased, and the specifications for 1892, by the amount of the four items which were paid as before stated, and for which the deceased held their receipt. It appeared that before the commissioners on the estate of the deceased, the plaintiffs presented for allowance charges not embraced in their specifications in county court, and that receipts were produced covering such charges, which they conceded to be correct. In explanation of this, one of the plaintiffs testified that they presented their bill as they did before the commissioners, supposing that the deceased had kept an account of his payments and that the same would be presented in offset. The specifications in the county court contain no items for 1895.

The plaintiffs excepted to the ruling of the court below, that the payment of the bill for 1895, as shown by the receipt and entry, when taken in connection with the facts stated and the character of the accounts as shown by the specifications, tended to prove payment of the charges prior to 1895.

The payment of the entire charges for 1895, taken in connection with the facts and circumstances stated, tended to prove the payment of the accounts prior to that year, and this exception cannot prevail.

It is not necessary to decide whether the payment of the charges for 1895, standing alone, would raise a presumption of payment of all the charges prior to that time.

Judgment affirmed and to be certified to probate court.

C. A. CRAMPTON *vs.* D. D. MCBAIN.

May Term, 1898.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed January 28, 1899.

Trustee Process—Bill of Lading—Attachable Interest.—The defendant, being the owner of a carload of hay at a station in Canada, bargained and sold but did not deliver the hay to the trustee, and thereupon took from the railroad company a bill of lading of the hay in his own name, consigned to himself at Boston, by way of St. Albans, with directions to advise the trustee at St. Albans and hold there for orders. He then drew a sight draft on the trustee for the price of the hay, payable to a bank in Canada, and procured the same to be discounted by the bank upon the transfer thereto of the bill of lading as collateral security. The draft was presented to and refused by the trustee, after which the hay, while at St. Albans, was attached, and the trustee summoned, in the present case. *Held*, (1) that the title never passed to the trustee, and that he was not chargeable; (2) that the title did pass to the bank subject to be divested by payment of the draft, and that no interest of the defendant remained which could be attached.

V. S. c. 71.—Upon the facts stated, the case is not controlled by our statutes permitting a creditor to attach and sell his debtor's property that is subject to mortgage, pledge or lien.

ASSUMPSIT. Plea to the jurisdiction, that the defendant was a resident of Canada and had no attachable interest in

the property attached, and no goods, effects or credits in the hands of the trustee. Trial by jury at the March term, 1898, Franklin county, *Rowell*, J., presiding. Verdict directed, and judgment therein rendered, for the defendant. The plaintiff excepted.

F. W. McGettrick for the plaintiff.

Wilson & Hall for the defendant.

TYLER, J. No question is made in respect to the validity of the attachment, provided the defendant had an attachable interest in the hay at the time of the service of the writ.

The defendant's testimony tended to show that February 2, 1897, he was the owner of the hay which was at the station of the N. Y. Cen. & Hud. R. R. Co. at St. Timothe, Ca., in the same cars it was in when subsequently attached at St. Albans; that he then bargained and sold but did not deliver the hay to the trustee; that he took from the agent of the R. R. Co. at St. Timothe a bill of lading in his name of each of the cars of hay consigned to himself at Boston by way of St. Albans, with directions therein to advise the trustee at St. Albans and to hold there for orders; that on February 3rd he drew a sight draft of that date on the trustee for $332.40, the price of the hay, payable to the order of the Hochelaga Bank of Valleyfield, Ca., and on the same day that bank discounted the draft for him and credited the amount to his deposit account, less discount and commission; that at the same time and as part of the same transaction the defendant indorsed and delivered the bill of lading to the bank as collateral security for the payment of the draft; that on February 3rd the bank forwarded the draft, with the bill of lading attached, to the Welden National Bank of St. Albans for collection, with directions not to protest for non-payment; that that bank received the papers on February 8th and at once demanded payment, which was refused, whereupon it returned the draft and bill of lading to the Hochelaga Bank, which at

once returned them to the bank at St. Albans, with directions to protest for non-payment, which was done on February 15, after demand and refusal of payment, and it then returned the draft and bill of lading to the payee; that the draft has never been paid, but it and the bill of lading have ever since been held by the Canadian bank.

The court held that the plea to the jurisdiction was sustained by this evidence and directed a verdict for the defendant, and the case comes here upon the plaintiff's exception to this ruling.

The main question is whether the defendant had an attachable interest in the hay at the time of the service of the writ. The plaintiff's contention is that if the defendant, by the sale of the hay to the trustee, parted with all his right, title and interest in the property, a debt was thereby created from the trustee to the defendant which was attachable by the trustee process; and that if all the defendant's right, title and interest did not pass to the trustee, then whatever interest remained in him only passed to the bank conditionally and was attachable; that though the bank could not be ousted of its security, whatever interest the defendant might have over and above the amount of the bank's claim was attachable, and that this was a question to be determined by the jury upon all the evidence.

As to the first proposition the case shows that while the trustee might have accepted a delivery of the hay and paid the draft, and was so advised by the St. Albans bank, he refused acceptance and payment, therefore the title did not pass to him and he did not become the defendant's debtor, and is not liable as trustee.

Upon the facts stated the case is not controlled by our statutes. Act No. 33, Laws of 1880, enables a creditor to attach and sell his debtor's property that is subject to a mortgage, pledge or lien. It provides that he may ascertain the amount of the mortgage, pledge or lien, pay the amount

and be subrogated to all the rights of the mortgagee, etc. All these provisions are contained in ch. 65, R. L., and in ch. 71, V. S.

Davis & Aubin v. *Bradley & Co.*, 28 Vt. 118, and *Tilden* v. *Minor*, 45 Vt. 196, were decided before the above act was passed, but the authority to attach the reversionary interest in personal property under lease, bailment or pledge, subject to the contract rights of the party holding possession thereof, existed when the latter case was decided, that authority having been given by Act No. 8, Laws of 1858, the provisions of which are now embodied in R. L. 1189, and in V. S. 1424. In *Tilden* v. *Minor* the facts were precisely like those in the present case in respect to the delivery of the bill of lading to the bank as collateral security for the payment of a draft, and, indeed, in every other essential particular, yet no allusion is made by court or counsel to the act of 1858. On the contrary, the court said: "The indorsement and transfer of the bill of lading as collateral security for the payment of the draft, vested in the bank the title to the cargo. . . . The movement of the immense products of the West to the seaboard involves the use of large sums of money, which requires confidence and credit. To insure that, the bill of lading has been held and regarded in law as the symbol and representative of the cargo. The assignment, for honest purposes, of the bill of lading, is effectually the assignment of the cargo; and since railways have made continents navigable as well as the sea, and immense products and almost limitless tonnage are floated by their agency to the great central depots of commerce, the propriety and necessity of the rule becomes more apparent, and the duty of the court to make it certain and inflexible, more obvious."

The Massachusetts cases cited by the defendant hold that the transfer and delivery of an inland bill of lading of goods to a person who advances money upon it is not in form and effect a mortgage, but is in law a delivery of the property

itself and vests in such person the title to the goods. In *Allen* v. *Williams*, 12 Pick. 297, *Shaw*, C. J., said: "Even a sale or pledge of the property, without a formal bill of lading, by the shipper, would operate as a good assignment of the property, and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery."

In Benj. on Sales, ed. of 1888, 334, (American note) it is stated that the bill of lading is regarded as the symbol of the property itself, and that a valid transfer thereof by the party in whose favor it runs, made before the property reaches the possession of the buyer, passes the title to such assignee of the bill of lading, and among the leading cases cited by Judge *Bennett* in support of this rule are, *Bank* v. *Jones*, 4 Comst. 497; *Bank* v. *Wright*, 48 N. Y. 1; *R. R. Co.* v. *Phillips*, 60 Ill. 190; *Schumacher* v. *Eby*, 24 Penn. St. 521.

This subject is discussed in 4 Am. & Eng. Enc., (2nd ed.) 521, 545. On page 548 the law is well summarized from many American decisions as follows: "Where the consignor draws upon his consignee for the purchase-money, and the draft, with bill of lading attached, is indorsed or transferred to some one who discounts the bill of exchange, a special property in the goods thereby passes to the transferee, subject to be divested by the acceptance and payment of the draft. And if the consignee refuses to accept the draft, the title of such transferee becomes absolute. But the acceptance and payment, by the consignee, of the draft, accompanied with the bill of lading or shipping receipt, vest the title to the goods in him."

After the defendant had delivered the hay to the railroad company, taken the bill of lading and transferred it with the draft to the Canadian bank, he had no attachable interest in the hay, and could have re-acquired an interest only by paying the draft. The bank, having the title, might

have transferred it to the trustee if he had chosen to take up the draft.

A different rule from the one above stated would tend to embarrass and interrupt interstate commerce, as was said by Judge *Redfield* in *Tilden* v. *Minor*, above cited.

Judgment affirmed.

FARRAR, BURT & CO. *vs.* E. H. POWELL, et al.

October Term, 1898.

Present: TAFT, ROWELL, TYLER, MUNSON and THOMPSON, JJ.

Opinion filed February 3, 1899.

Multifariousness.—A bill is multifarious only when the orator claims several matters of different natures, not when one general right is claimed, although the defendants may have separate and distinct rights.

Assignment—R. L. c. 94.—One of the defendants assigned his assets to three others of the defendants, ostensibly under R. L. c. 94, but the assignees were also creditors and the assignment was, therefore, void as against the orators, who were creditors, unless they assented thereto. If the assignment should be treated as one at common law their assent was likewise necessary. The orators, therefore, cannot maintain this bill, which is predicated upon the assignment and calls upon the assignees to account, for instead of assenting to the assignment they expressly dissented therefrom by suing the assignor and attaching the assigned property, thus making their choice between inconsistent remedies.

CHANCERY. Heard in the vacation following the March term, 1897, Franklin county, upon demurrer to the bill brought forward in the defendants' answer, before *Ross*, Chancellor, who sustained the demurrer, adjudged the bill insufficient and dismissed the same with costs. The orators appealed.

The bill alleged that in 1891 defendant Goodspeed was

in embarrassed circumstances and unable to meet his obligations as they fell due; that it was believed by him and his creditors that his property if judiciously managed and disposed of could be made to pay his debts; that an agreement was accordingly made between Goodspeed and his creditors, including the orators, that all of his assets should be assigned to three disinterested capable and honest persons to be disposed of for the benefit of the creditors under and by virtue of chapter 94 of the Revised Laws of this State; that the orators relying upon said agreement forbore the collection of their debts in the ordinary manner; that after the making of said agreement Goodspeed, without the knowledge or consent of the orators or any of his creditors, made an assignment for the benefit of his creditors to defendants Powell, Robb and Lambert, who were themselves creditors, and who in the first instance attempted to carry out the provisions of the aforesaid agreement by complying with said chapter 94 and agreeing to faithfully perform said agreement, and took possession of the property assigned; that Goodspeed in selecting the defendants Powell, Robb and Lambert violated his agreement in that he did not select three discreet, honest and disinterested persons, inasmuch as said defendants, being creditors, were interested and legally disqualified to perform the trust; that Goodspeed did not convey to said assignees all of his property, and that defendants Powell, Robb and Lambert did not keep their said agreement, did not file a true list of property and schedule of the creditors, but disregarded their duties and obligations to the property and converted the same to their own use, and finally distributed the property among themselves and refused to account in accordance with the provisions of said chapter; that the orators did not know that Powell, Robb and Lambert were creditors and legally disqualified at the time of their appointment, but afterwards, being advised by counsel that said assignment was void, prayed out a writ

of attachment against Goodspeed, attached certain of the assets and obtained judgment in their suit, after which they found that the defendants had placed said property beyond the reach of process; that a large number of intricate legal questions are involved and numerous vexatious suits likely to grow out of the said transaction, and that an accounting should be had and the defendants required to answer; that Goodspeed should be required to state whether he has conveyed to his assignees all of his property according to his agreement; that Powell, Robb and Lambert should be directed to account for the property conveyed to them and to pay the orators their just proportion of the same.

W. D. Stewart and *C. G. Austin* for the orators.

Hogan & Royce and *Powell & Powell* for the defendants.

TAFT, J. The first point raised is that the bill is multifarious. A demurrer for multifariousness holds only when the orator claims several matters of different natures. When one general right is claimed by the bill, though the defendants have seperate and distinct rights, a demurrer will not hold. *Lewis* v. *St. Albans I. & S. Works*, 50 Vt. 477; *Smith* v. *Scribner*, 59 Vt. 96. There is but one general right claimed by the bill before us. That is, that the assignees shall account for the property which came into their hands by virtue of the assignment from the defendant Goodspeed. No one is made a party defendant unless it is alleged in the bill that he has been in some way connected with the fraudulent disposition of the property or, in some manner, with the proceedings in respect to it. The matters of the bill are not of different natures, and therefore the bill is not multifarious.

The assignment was made by Goodspeed to Powell, Robb and Lambert, in terms, under R. L. chap. 94. It is suggested that the chapter was repealed, by implication, by the passage of the law relating to voluntary insolvency,—No. 1, Acts 1876. If the assignment law was in force, the

assignment was invalid as to the orators, if they so elected, the assignees being creditors of the assignors, but would have been valid if the orators had assented thereto. *Merrill* v. *Englesby*, 28 Vt. 150. If the law of assignments was repealed, in the manner claimed, the assignment was good as a common law one. See *Mason* v. *Hidden*, 6 Vt. 600, and *Hall* v. *Denison*, 17 Vt. 310. A common law assignment must be assented to in order to bind a creditor. The result is that if treated as either a statutory or a common law assignment, the bill cannot be maintained. The orators dissented, as shown by the fact that after the assignment by Goodspeed they brought a suit at law against him and attached the assigned property, and in that suit obtained judgment for the amount of their claim.

When the assignment was made, whether it was a common law or a statutory one, it was competent for the orators in the first place to have treated it as operative and valid, and claim their rights under it, or they could have disaffirmed the assignment, a contract made for their benefit. *Bishop* v. *Catlin*, 28 Vt. 71. They treated it as not binding upon them, and proceeded at once to attach the assigned property and hold it independent of the assignment, or any rights of the assignees to it. The orators could not do both. They could not at the same time treat the assignment as valid and invalid. Having chosen the latter course and attached the assigned property, or a large part of it, upon the ground that the assignment was illegal, they cannot now abandon that position, ratify the assignment and maintain this proceeding. It was not the bringing of the suit and obtaining judgment that determined their election. That, they had a right to do. *Bank* v. *Deming*, 17 Vt. 366. It was disaffirming the assignment by an attachment of the assigned property which barred them from maintaining the position they now assume. Having made an election they are bound by it, whatever the result of the attachment may have been. If a person has

two rights that are inconsistent with each other, as when one action is founded on an affirmance, and the other on a disaffirmance, of a contract or sale of property, if he seeks one of the rights he is barred from taking a different position in seeking the other. *White* v. *White*, 68 Vt. 161.

The decree dismissing the bill was correct; the same is affirmed and cause remanded.

LAMOILLE COUNTY NATIONAL BANK *vs.* B. A. HUNT.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed February 11, 1899.

Argument Improper but not Prejudicial.—A judgment should not be reversed for the improper argument of counsel addressed to a point upon which the jury found in favor of the excepting party, when the argument was not derogatory to his character and could not have harmed him upon the other issues.

GENERAL and special assumpsit. Trial by jury, at the April term, 1898, Lamoille county, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

Defendant *pro se*.

R. W. Hulburd for the plaintiff.

ROWELL, J. The exception to overruling the demurrer to the declaration being waived, and there being no exception touching the matter of usury, the only question is as to certain remarks of plaintiff's counsel in argument to the jury.

The action is for the recovery of three promissory notes, signed by the defendant as surety. The defendant conceded

his liability on one of the notes, but claimed that the other two were paid by giving a new note not in suit for the balance due thereon; and the jury so found.

In arguing this question of payment, plaintiff's counsel said that the defendant was not doing the business of signing these notes as a matter of charity; that if the note not in suit was taken as payment, it would then result in a delay only; that the same defences were open in the case on trial; but that delays sometimes allowed debtors to put their property beyond the reach of process; and that all these matters were to be considered by the jury. Thereupon the defendant objected and asked for an exception, on the ground that there was no evidence in the case tending to show such facts, and the court allowed an exception, whereupon plaintiff's counsel said to the jury that he did not claim there was any such evidence, and, as the court understood, retracted his statement, and nothing more was said about it by either party. There was no evidence that the defendant received anything for signing said notes, nor any of his putting his property beyond the reach of process, nor was any such claim made on trial.

If the issue to which alone these remarks related had been found for the plaintiff, they might have vitiated the verdict; for they were an appeal to the jury to disregard the testimony, and to find for the plaintiff on the ground of expediency. But as that issue was found for the defendant, he was not harmed thereon by the remarks.

Although the defendant was not allowed all he claimed under his plea in setoff; yet, as the issues thereunder were entirely foreign to the question of payment, and as the remarks were not at all derogatory to the defendant personally, it is clear enough that he was not prejudiced thereby on that branch of the case.

Judgment affirmed.

WILLIAM C. MOUND *vs.* CHARLES E. BARKER.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed February 11, 1899.

Bond Given to Further an Illegal Purpose.—The law will not enforce the payment of rent upon a hotel leased with the understanding and expectation on the part of both landlord and tenant that intoxicating liquors are to be sold upon the premises contrary to law, if they are thus sold, nor will it enforce a bond given by a third party to secure the payment of the rent.

DEBT ON A BOND. Special plea and notice. Trial by court, at the March term, 1898, Rutland county, *Start*, J., presiding. *Pro-forma* judgment for the defendant to recover his costs. The plaintiff excepted.

The defendant offered to show by parol evidence that at the time the lease and bond were executed the plaintiff and the lessees understood and expected that intoxicating liquors would be sold in the hotel leased, in violation of law, by the lessees, and that such liquors were sold therein with the knowledge of the plaintiff. The plaintiff objected to this evidence as contradicting and varying the written lease. The objection was overruled and the evidence received ,and the plaintiff excepted.

Joel C. Baker for the plaintiff.

Although the plaintiff knew that the lessees intended to sell intoxicating liquor upon the premises contrary to law, that intent did not enter into the agreement, and so long as the plaintiff did nothing in furtherance of that purpose it does not vitiate the contract. *Kreiss* v. *Seligman*, 8 Barb. 439; *Carrigan* v. *Lycoming Fire Insurance Co.*, 53 Vt. 423; *Bryson* v. *Haley*, 38 Atl. 1006.

Butler & Moloney and *F. S. Platt* for the defendant.

ROWELL, J. When an agreement, innocent in itself, is designed by one of the parties to further a purpose forbidden by the law or opposed to its policy, courts will not enforce it in favor of such party nor in favor of the other party if he is implicated in such design. Thus, when property is leased with knowledge on the part of the lessor that the lessee intends to use it for an illegal or an immoral purpose and does so use it, the rent therefor cannot be recovered. *Sherman* v. *Wilder*, 106 Mass. 537; *Riley* v. *Jordan*, 122 Mass. 231; *Ernst* v. *Crosby*, 140 N. Y. 364; 2 Taylor, Land. & Ten., 8th Ed., § 521; *Jennings* v. *Throgmorton*, Ry. & M. 251—21 E. C. L. 744; *Smith* v. *White*, L. R. 1 Eq. Cas. 625.

Carrigan v. *The Lycomin Fire Ins. Co.* 53 Vt. 418, is not opposed to this, for there the liquors were legitimately used in the plaintiff's drug business, though occasionally sold in violation of law, and no illegal design entered into the making of the policy.

The bond in suit was given by the defendant as surety for the lessees of a hotel, conditioned for the payment by them of the rent reserved, and was executed at the same time as the lease. The lease was innocent, in itself, but at the time of its execution and delivery, both the plaintiff, who is the lessor, and the lessees understood and expected that the hotel would be used, not only for the entertainment of guests, but that intoxicating liquor would be sold therein in violation of law; and it was so sold, to the knowledge of the plaintiff. Therefore if this suit was upon the lease itself, it could not be maintained. It can be maintained no better on the bond, for when the foundation fails, all goes to the ground. *Riley* v. *Jordan*, 122 Mass. 231.

Judgment affirmed.

M. A. KENT *vs.* THE VILLAGE OF ENOSBURG FALLS and W. A. KENDALL *vs.* THE SAME.

January Term, 1899.

Present: TAFT, C. J., ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed February 11, 1899.

Sessions Proceedings—Jurisdiction.—The defendant's charter authorizes its trustees, on the application in writing of five or more freeholders and lawful voters of the village, to make and maintain common sewers, when the public health or convenience requires their construction, and assess abutting landowners benefitted thereby. *Held*,

(1) That the trustees had no jurisdiction unless they found that the public health or convenience required the construction, and that this jurisdictional fact must appear of record and could not be inferred from their having granted the prayer of the petition.

(2) That the question of jurisdiction was well raised in the county court upon the appeal from the preliminary proceedings.

(3) That the failure of the record to show that the trustees found this jurisdictional fact was not made good by the finding of the county court commissioners that the public health and convenience required the construction.

(4) That the petition was bad in failing to show upon its face that the owners were freeholders and legal voters of the village.

APPEALS from sewer assessments made by the trustees of defendant village under Acts 1892, No. 119. Heard on the report of commissioners, at the September term, 1898, Franklin county, *Tyler*, J., presiding. Petitions dismissed with costs. The petitioners excepted.

Emmett McFeeters and *Farrington & Post* for the petitioners.

Wilson & Hall for the defendant.

ROWELL, J. These are appeals from sewer assessments by the trustees of the defendant village. The primary question is one of jurisdiction, which can be properly raised on these appeals. *Boyden and Herrick* v. *The Village of Brattleboro*, 65 Vt. 504.

The defendant's charter authorizes its trustees, on the application in writing of five or more freeholders and lawful voters of the village, to make and maintain common sewers when the public health or convenience requires their construction, and to assess abutting landowners benefitted thereby. This makes the question of whether the public health or convenience requires the construction of a sewer a jurisdictional fact, and the establishment of it by the trustees themselves is necessary in order to confer jurisdiction and to enable them to act legally in the concrete case. Now it does not affirmatively appear in these cases that the trustees found that fact; but the village claims that it must be taken that they did find it, because they voted to grant the prayer of the petition asking for the sewer, and proceeded to construct it accordingly. But as this is a sessions proceeding, the exercise of jurisdiction does not imply a previous ascertainment of the facts necessary to confer it. Nothing is presumed in favor of the jurisdiction of boards and inferior courts exercising special and limited statutory powers not according to the course of the common law, but the facts that confer jurisdiction must affirmatively appear. This has often been held in this State. *Bates* v. *Hazeltine*, 1 Vt. 81; *Barrett* v. *Crane*, 16 Vt. 246; *Hewes* v. *Andover*, 16 Vt. 510. And the rule is the same elsewhere, with some exceptions. 12 Ency. Pl. & Pr. 176, 212, 213; 1 Smith Lead. Cas. [*816; 2 Whart. Ev. § 1308; *Carratt* v. *Morley*, 1 Q. B. 18.

If the rule were not so, there would be no distinction between inferior tribunals and courts of general jurisdiction; for when it is shown that an inferior tribunal had jurisdiction, the maxim that all acts are presumed to have been rightly and regularly done, applies to it the same as to a court of general jurisdiction. 12 Ency. Pl. & Pr. 201, 202; 1 Smith Lead. Cas. 817*].

The finding by the commissioners appointed by the county court that said jurisdictional fact existed is of no avail,

because, as we have said, it was for the trustees to find that fact.

The petition herein is not good, as it does not show on its face that the requisite number, nor indeed any, of the signers thereof were freeholders and legal voters of the village. This it should show, as those are necessary jurisdictional facts; and in sessions proceedings, of which this is one, jurisdiction must appear on the face of the record. *Hewes* v. *Andover*, 16 Vt. 510. And see 12 Ency. Pl. & Pr. 177-8. It is unnecessary to consider whether the petition is amendable in this respect, as the other question is fatal to the judgments below.

Judgments reversed, assessments annulled and set aside, and judgment for the petitioners to recover their costs in this court and the court below.

LUCY JANE ANDREWS *vs.* MARY ANN SARGENT'S ESTATE.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON, and WATSON, JJ.

Opinion filed February 17, 1899.

Construction of Will—Shifting Executory Bequest.—The will gave each of the testator's daughters five hundred dollars, thus, one hundred and fifty dollars in certain personal property when and in case she should be married within eight years from the date of the will, and the balance in cash at the end of that period, and if not married within that time five hundred dollars in cash at the end of the eight years. It then provided that if either daughter should die leaving no children, her legacy should be divided among the survivors. *Held*, to mean, if she should die without children *before the expiration of the eight years*, and that, all having lived beyond that period, each took her share absolutely, so that upon her subsequent death without children her share passed under the statutes of descent instead of to her surviving sisters.

APPEAL FROM PROBATE. Heard on an agreed statement of facts, at the March term, 1898, Rutland county, *Start*, J., presiding. The decree of the probate court was affirmed. The plaintiff excepted.

Clauses 5 and 6 of the will read as follows:

"5th. I give and devise to my daughters, Mary Ann, Lucy Jane and Clarissa B., above named the sum of four hundred dollars each payable by my residuary legatee hereinafter named, in the following manner, to wit: The sum of one hundred and fifty dollars each in furniture or a cow and ten sheep, all at cash price, any time upon reasonable notice when they or either of them should marry, and the balance (or the sum of three hundred and fifty dollars each), payable in eight years from this date, and in case all or either of them should not marry within the time of eight years, as above, the whole sum shall be payable at the end of said period in cash.

"6th. It is my will that if either of my daughters should decease leaving no heirs, that their legacy above named should be divided among such of them as shall survive."

E. J. Ormsbee and *J. C. Baker* for the plaintiffs, cited 2 Williams on Executors, 567; *Re Luddy*, 25 Ch. D. 394; *Re Hayward*, 19 Ch. D. 470; *Shepard's Heirs* v. *Shepard's Estate*, 60 Vt. 109.

Charles L. Howe and *Butler & Moloney* for the defendant.

TAFT, C. J. The question before us arises upon the construction of the will of David Richardson dated in February, 1847. He died in August following, and soon afterwards his will was duly proved. He gave each of his three daughters, Mary Ann, Lucy Jane, and Clarrissa B., in case she married within eight years from the date of the will, one hundred and fifty dollars in certain personal property, but if not married within that time, he gave her five hundred dollars, payable in cash at the end of that period, with this proviso: "6th It is my will that if either

of my daughters should decease leaving no heirs, that their legacy above named should be divided among such of them as shall survive." It is agreed the word, "heirs" shall be construed as "children." Mary Ann married Junia Sargent about 1862, and died in April, 1896, never having had children. Clarissa B. died prior to the decease of Mary Ann. Lucy Jane survives, and as such survivor claims the five-hundred-dollar legacy which Mary Ann received in 1882, and which she, during her life, kept intact. If Lucy Jane is not entitled to it, it passed, under the laws of this State, to Junia Sargent, the husband of Mary Ann. The proviso in the will did not create a condition, for upon a condition there can be no gift over to a third person. Conditions can only be reserved for the benefit of the grantor and his heirs. A stranger cannot take advantage of the breach of them. 4 Kent's Com. 127. The proviso created a conditional limitation, a term used in the sense of a shifting executory bequest, the effect of which is to cut short an estate previously created and substitute another in its stead. 4 Kent's Com. (14th Ed.) 128 note *a*; Gray's Restr. on Alien. (2nd Ed.) § 22 note 1. Thus, by the will, the bequest is to Mary Ann, but if she dies unmarried, her estate is cut short and shifted to the survivor or survivors. One estate is cut short, and another substituted in its place. The important question is, to what time did the testator refer in the clause "if either of my daughters should decease leaving no heirs (children)" etc. Was it the time the legacies were payable, or at some indefinite time thereafter? The estate vested in interest upon the death of the testator, subject to be divested in case the legatee died, leaving no children, before the eight years elapsed, that being the time when the legacy became payable. We hold that the words in the proviso, "if either of my daughters should decease leaving no heirs (children)" etc., refer to the time when the legacies became due; when they vested in possession, at the expiration of eight years from the date of the will. Such

was the manifest intent of the testator. The language of the sixth clause indicates such intent: "It is my will that if either of my daughters should decease leaving no heirs (children) that their legacy above named should be divided among such of them as shall survive." It is a direct reference to the time the bequests become payable. There is nothing in the will to indicate an intent to create a life estate in the five hundred dollars, in those dying leaving no children. It is natural to suppose the testator intended a benefit to those rearing children. Two of the daughters might have reared large families, but if they survived their children and died before the third sister, who may have remained unmarried, the latter would take the legacies of the mothers, and the whole fund pass to the childless. The manifest intent of the testator was, that at the end of the eight years the three legacies of fifteen hundred dollars should be divided among the survivors of the three daughters in case the deceased ones left no children.

The record discloses the fact that the testator had three daughters and two sons; and it is fair to infer from the facts stated that the sons took the estate valued at more than ten thousand dollars and paid the legacies due the daughters, viz: the fifteen hundred dollars. Is it probable the testator would give his daughters the small legacy specified and limit their interest to life estates unless they, at the end of what might be a long life, had children surviving them? We think not. It was for the reason of supporting the will of the testator that executory devises or bequests were instituted, for when it was evident that the testator intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then, out of indulgence to wills, held to be good as an executory devise or bequest. 4 Kent's Com. 264.

Judgment Affirmed and ordered certified to the probate court.

ARTHUR STEVENS et al. *vs.* LOUIS COBURN.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed March 4, 1899.

Jurisdiction—Action of Account.—An action of account at common law cannot be maintained to settle partnership matters between three or more partners having separate and distinct interests.

V. S. 1451, 1452.—V. S. 1451, 1452, conferring jurisdiction in such cases upon the county court do not extend that jurisdiction to justice courts nor to the city court of Montpelier.

Declaration Construed.—The declaration is construed as meaning that the nineteen plaintiffs and one defendant held each a one-twentieth interest, rather than that the plaintiffs represent one moiety and the defendant another. If the latter be the fact the declaration is subject to amendment and the action may, perhaps, lie.

ACTION OF ACCOUNT. Heard upon motion to dismiss for want of jurisdiction, and demurrer to the declaration, at the September term, 1898, Washington county, *Start*, J., presiding. *Pro-forma* judgment denying the motion and overruling the demurrer. The defendant excepted.

The declaration alleged among other things that the plaintiffs and the defendant "were associated together as partners and tenants in common in an organization known as the Young Peoples Independent Club of North Montpelier, Vermont, in which the plaintiffs, and the defendant were mutually interested;" and further that the defendant "agreed to render to the plaintiffs a just and true account of all moneys so received by the defendant for the mutual benefit of the plaintiffs and the defendant, and to pay the same to the plaintiffs upon request."

John J. Wing for the plaintiff, contended that the declaration should be construed as alleging that the

plaintiffs represented one interest and the defendant another, so that there were really but two parties.

T. G. and *E. H. Deavitt* for the defendant.

TAFT, C. J. This is an action of account in favor of nineteen partners against a co-partner, brought in the city court of Montpelier, and the sole question is, had the city court jurisdiction? It has "jurisdiction of all matters of a civil nature" if "the debt or other matter in demand does not exceed five hundred dollars." Acts 1896, No. 149, § 5. Actions of account are of a civil nature. An action of account at common law cannot be maintained to settle partnership matters between three or more partners having separate and distinct interests, for the reason that no separate judgments can be rendered in such an action. The remedy is in equity. The county court has such jurisdiction given it by V. S. 1451, 1452. These sections do not extend such jurisdiction to justice courts, *LaPoint* v. *Scott*, 36 Vt. 633, nor to the city court in Montpelier. That that court has no jurisdiction between three or more partners having diverse interests, is fully sustained by *Wiswell* v. *Wilkins*, 4 Vt. 137, and *La Point* v. *Scott*, *supra*.

If the nineteen plaintiffs represent one interest and the defendant another, in moieties, it is likely the action may lie. But we do not give the declaration that construction, but consider that each of the nineteen plaintiffs and the defendant are equal in interest each with the other. The declaration can be amended in the respect named if the plaintiffs are so advised. Therefore the case may be remanded.

Judgment reversed, demurrer sustained, declaration adjudged insufficient and cause remanded.

WILLIAM F. WALKER, et al., admr., *vs.* E. W. ARNOLD.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed March 4, 1899.

Ejectment—Possession—Adverse Occupation—Estoppel fed by subsequently Acquired Title—Betterments.—The defendant in an action of ejectment contracted to buy the land in question of the plaintiffs and was to have a deed when he had made certain payments. He failed therein and insisted that he was excused because he had not received possession of one part of the land which he claimed was adversely occupied by one Morse and was of more value than the payments due. *Held*,

(1) That when the defendant took possession of a portion of the premises he was in constructive possession of all, herein following *Hunt* v. *Taylor*, 22 Vt. 556.

(2) That the evidence failed to show that Morse was in adverse possession when the contract was made or when the defendant took possession, the acts of Morse being mere trespasses.

(3) That Morse had no title, for he had warranted the land to the plaintiff's intestate and any subsequent title he acquired fed the estoppel created by his conveyance to the plaintiffs, herein following *Jarvis* v. *Aikens*, 25 Vt. 635.

(4) That even if Morse was in occupation at the time of trial, that fact constituted no defense to this action, for whoever succeeds to the title succeeds also to the perils of the suit.

(5) That the defendant had no rights under the statute relating to betterments, as the title did not "prove to have been defective."

EJECTMENT. The general issue and two special pleas in bar. Replication, *de injuria*. Trial by jury, at the September term, 1897, Rutland county, *Munson*, J., presiding. Verdict ordered and judgment thereon rendered for the plaintiff for possession and damages. The defendant excepted.

It appeared that Morse claimed title to the land occupied by him under a deed from one Ryan of a farm adjoining the land in question, the division line between the two properties being the town line. Morse had previously conveyed the land in question to the plaintiff's intestate, bounding it by

the town line, but now claimed that the Ryan farm extended beyond the town line.

Butler & Moloney and *H. A. Harman* for the defendant.

J. C. Baker for the plaintiff.

TAFT, C. J. The defendant contracted to buy of the plaintiffs a piece of land in Benson, and was to have a deed when certain stipulated payments were made. He failed therein, and insists he was excused therefrom because the plaintiffs did not give him possession of all the land contracted for. He claims that one Morse was in possession of about two and one half acres of the land situate on the north bank of Sunset Lake. When the defendant took possession of the premises, he was in constructive possession of it all. It is needless to cite authorities in support of this proposition; but that the rule applies to such cases as the one at bar, see *Hunt* v. *Taylor*, 22 Vt. 556.

The record does not disclose any testimony tending to show any occupation by Morse of the disputed tract, at the time of the contract, nor at the time the defendant took possession under it. The testimony of the witness Morse is as favorable to the defendant as any which is in the record. He testified that he was in possession of the disputed tract, but when his acts are shown, with reference to the possession, it fails to establish the fact. The most that his testimony establishes is that he cultivated a small piece one summer, and that during each summer, he permitted not more than three picnic parties to go upon the banks of the lake during the day, and his acts of possession in building a fence enclosing not more than six rods of the picnic grounds, were the summer after the suit was brought. This testimony tended to show occasional unlawful entries upon the land, made after the contract, but no tendency to establish the fact that Morse was in possession at the time the contract between the plaintiffs and defendant was made and when defendant took possession under it. Neither has the defendant been evicted by paramount title, for the case

shows that Morse had no right, title nor claim to the land in question,—neither at the time the contract with the defendant was made, nor since.

If Ryan owned the disputed tract prior to the sale of his farm to Morse, the latter having conveyed it by warranty deed to Walker prior to that time, when Morse took the deed from Ryan to him the disputed tract passed to Walker, for the conveyance from Ryan to Morse fed the estoppel created by the conveyance in the deed from Morse to Walker. *Jarvis* v. *Aikens* 25 Vt. 635.

There having been no adverse possession by Morse at the time the contract was entered into, nor when the defendant went into possession, and no testimony tending to show it, and no eviction under a paramount title since, the defendant was not relieved from making his payments under his contract. Conceding that Morse was in occupation at the *time of the trial*, he had acquired such possession by trespassing upon the land after the contract between the defendant and the plaintiff was made, and the action cannot be defeated by showing such fact, for the defendant in ejectment cannot defeat the action by transferring the title either with or without consideration; whoever succeeds to the possession, succeeds also to the perils of the suit. If the rule were otherwise, by successive alienations and repeated transfers and trespasses, litigation could be protracted and the administration of justice indefinitely delayed. Persons unlawfully entering upon the land pending ejectment are bound by the judgment subsequently rendered, and are subjected to removal by the final process.

The defendant, not having made his payments, was not entitled to retain possession of the premises, and had no rights under the statute relating to betterments. It is only when a defendant in ejectment supposes the title to be good in fee and his title "proves to have been defective," that he can successfully invoke the aid of the betterment statutes. *Brown* v. *Storm*, 4 Vt. 37.

Judgment affirmed.

THOMAS W. THORP, exr., *vs.* L. F. WILBUR, exr.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed March 15, 1899.

Homestead—Abandonment—Intent—Question of Fact.—Whether premises are so used or kept as to constitute a homestead is largely determined by the intention of the homesteader, and this is a fact to be established by the party claiming the right. In this case the facts show an abandonment of a former homestead and a foreclosure of the homesteader's right in the larger part of the newly acquired homestead.

Commissioners appointed by the probate court set out a homestead in one part of the decedent's estate, and an appeal was taken from their action. Commissioners appointed by the county court found the facts upon which this court holds that there was an abandonment by the decedent of a former homestead and the adoption of a new one substantially identical with the one set out by the probate court commissioners; but the county court commissioners set out a homestead in the old portion of the premises inasmuch as the newly adopted homestead had been lost by the expiration of a decree of foreclosure. *Held*, that the newly adopted homestead must be adhered to, and that the widow was left only such portion as she had not lost through the foreclosure.

APPEAL FROM PROBATE. Heard on the report of the commissioners appointed to set out a homestead, at the September term, 1898, Chittenden county, *Ross*, C. J., presiding. Judgment that the defendant is entitled to the homestead set out to his testate by the probate court commissioners, so far as the same has not been extinguished by the foreclosure of the mortgage, and to no other homestead or homestead right. No costs to either party. The defendant excepted.

The plaintiff is the executor of the will of Homer Thompson and the defendant is executor of the will of Lovisa A. Thompson, widow of said Homer. April 21,

1887, Benjamin Wheeler and wife conveyed to Homer Thompson premises in Jericho having a frontage on the highway of about eleven rods and a depth of about six rods, with a dwelling-house thereon but no other buildings. September 1, 1887, said Thompson and wife moved into said dwelling-house and occupied the same as their home until June 13, 1892, using in connection therewith a part of the lower story of a tin shop which had been erected in the rear of said dwelling-house since their purchase of the premises, and also using certain parcels of land hereafter described. Shortly after the purchase of the premises said Homer had erected thereon a building the lower story of which he occupied as a store until his death, and the upper story of which was at first used as a public hall. A little later he erected the tin shop before mentioned and still later transformed the hall into a tenement to be used as a dwelling by himself and wife, and on June 13, 1892, began to occupy it as such and continued to reside there until his death, March 27, 1895; and his wife continued to reside there until her death June 15, 1896. A platform extended from the upper story of the tin shop to the tenement over the store and was used as a washing room in connection with the tenement. When the family moved from the small dwelling-house to the rooms over the store the house was leased to a tenant, said Thompson reserving a small part of the cellar for storage purposes, also a small piece of land directly in front of the house for a flower bed and a small piece in the rear of the house for flowers and vegetables. These reservations were kept and occupied by Thompson for the purposes stated until his decease. There was also a well between the dwelling-house and tin shop which was used in connection with the tenement. The rest of the premises in the Wheeler purchase with the buildings afterwards erected, except a piece of land used for the piling of wood, was used by said Thompson in his business. January 3, 1888, Homer Thompson executed his sole mortgage deed

to Thomas W. Thorp of a strip of land sixty-three feet wide fronting on said highway and extending back eighty-six feet on the easterly side of the Wheeler purchase, being the land upon which the store was erected. The mortgage described the premises as bounded on the westerly side by Thompson's homestead and the premises claimed to within a few inches of the said small dwelling-house and tin shop but were not separated from the same by any fence or other barrier and did not cover the well or lands used as flower beds and garden.

The county court commissioners found from the foregoing facts that after the removal from the dwelling-house to the tenement over the store the upper part of the tinshop, the well, the part of the cellar under the dwelling-house, the lands in front and rear of the same used for raising flowers and vegetables, and small places in the rear of the lot used for piling wood, were, in connection with the tenement over the store, used, occupied and kept by the said Thompson and his wife in their lifetime and at their death as a homestead.

At the March term, 1896, said mortgage, having been assigned to W. E. Thorp, was foreclosed and the plaintiff, as executor of Homer, and the said Lovisa A. Thompson, were made defendants. On the 18th day of February previous said Lovisa had brought her petition to the probate court to have her homestead set out from the premises covered by the Wheeler purchase. Said foreclosure case as finally determined is reported in 70 Vt. 47.

The petition of the said Lovisa was granted by the probate court and commissioners were appointed who appraised and set off as her homestead the tenement over the store, the room over the tinshop, the right to take water from the well and certain other rights and privileges in conection with said premises, from which proceedings the plaintiff herein appealed.

The county court commissioners found that from and after

said 13th day of June, 1892, said mortgaged premises were never worth more than the incumbrance, and in view of the facts above set forth reported that the estate of said Lovisa is entitled to a homestead in the Wheeler premises, and set forth the same by metes and bounds in a portion of the premises not included in the mortgage.

L. F. Wilbur for the defendant.

W. L. Burnap and *J. J. Monahan* for the plaintiff.

ROWELL, J. A homestead consists of a dwelling-house, out-buildings, and the land used in connection therewith, not exceeding five hundred dollars in value, used or kept as a homestead. When Thompson moved into the rooms over the store, which he finished for the purpose of living in himself, he rented the little house that he had been living in, reserving a small part of the cellar for storage purposes, a small piece of land in front of the house for a flower-bed, and a small piece in the rear for flowers and vegetables.

The commissioners find that after moving into the store in June, 1892, said rooms, in connection with a portion of the upper part of the tinshop, the well between the tinshop and the little house, said reservations, and certain small pieces of land in the rear of the tinshop that were used for piling wood, were used, occupied, and kept by Thompson and his wife as a homestead until he died in March, 1895, and thereafter by her till she died in June, 1896. The rest of the premises, they find, with the buildings that Thompson erected thereon, were used by him in his business. It being found that said reservations were kept and used as aforesaid during all the time Thompson and his wife lived over the store, we infer that the little house was rented all that time. This fact, and the fact that the rooms over the store were used and kept as a homestead, conclusively show that the little house was abandoned as a dwelling-house, and that thereafter it was neither used nor kept as a part of the homestead, but only for the purpose of renting. It can,

therefore, constitute no part of the homestead. *Bugbee* v. *Bemis*, 50 Vt. 216. Nor, for the same reason, can the land rented with it, if any there was, which does not appear, though it would seem that there was some, for otherwise there was no need of reserving any in the lease.

The dwelling-house, then, being in the store building, the homestead right centered there, and when the decree of foreclosure became absolute, that part of the right—which was of nominal value only, as the mortgage debt was more than the value of the land—was lost, leaving nothing to satisfy the rest of the right except what there was of the homestead in that portion of the premises not covered by the mortgage. Now we have seen that what was rented of that portion constituted no part of the homestead. Nor did what Thompson used of it in his business, because he neither used nor kept it as a homestead; for when the commissioners find specifically what of that portion he did use and keep as a homestead, and do not include what he used in his business, they by necessary implication find that he did not use nor keep that part as a homestead, and did not intend it to be a part of his homestead. Whether premises are so used or kept as to constitute a homestead is largely determined by the intention of the homesteader. *Whiteman* v. *Field*, 53 Vt. 554; *Thorp* v. *Thorp*, 70 Vt. at p. 50. And whether they are so used or kept is a fact to be established by the party claiming the right. *Russ* v. *Henry*, 58 Vt. 388; *Thorp* v. *Thorp*, 70 Vt. at p. 50. Here the party claiming has failed to establish the right in the rented portion of the premises not covered by the mortgage, and in the part that was used by the homesteader in his business; but in the rest of the unincumbered part of the premises he has established the right, and therefore is entitled to have that part set out to him accordingly.

The judgment of the probate court that the widow was entitled to a homestead does not affect the question, though not appealed from, for that adjudication was based upon

the case made by her petition to have a homestead set out to her, and was simply a decision that upon the facts alleged she was entitled to a homestead.

The county court adjudged to the defendant, who is the personal representative of the widow, the homestead set out by the commissioners appointed by the probate court, as far as the same had not been extinguished by the decree of foreclosure. This gives the defendant less than the county court commissioners have found was used, occupied, and kept as a homestead in the unincumbered part of the premises.

Therefore that judgment is reversed, and judgment that the defendant is entitled to have set out to him all that the county court commissioners have found was then used, occupied, and kept, as shown by their report. Let the defendant recover his costs in this court, but not below, for such was the judgment there. Let this judgment be certified to the probate court.

SUSAN B. SOWLES, MARGARET P. SOWLES and E. A. SOWLES *vs.* GUY L. BUTLER.

October Term, 1898.

Present: ROSS, C. J., TAFT, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed April 28, 1899.

Deed or Mortgage.—Stearns conveyed land to Bellows, and as a part of the same transaction Bellows leased the same premises to Stearns for ten years at an annual rent of $26.61, giving Stearns the right at the end of any year, no rent being unpaid, to purchase the premises for $266.14. Within one month thereafter Stearns conveyed a small tract of the land by warranty deed to a third party, and not long after conveyed the rest of the premises by warranty deed to one Hubbell, to

whom he also assigned the lease, and in said deed warranted the premises free from incumbrance "except to said Bellows of two hundred dollars." The lease was afterwards paid and satisfied, and so entered thereon by Bellows himself. *Held*, that Bellows acquired no title to the disputed tract by virtue of the deed from Stearns save the title of a mortgagee.

Pierce v. *Brown*, 24 Vt. 165, distinguished.

Assignment—Master's Finding.—The master was justified in finding that an assignment operated to pass the assignor's interest to the assignee although the assignment was not recorded until after the commencement of the suit.

Adverse Possession.—The grantee of land in adverse possession of another is not a *bona-fide* purchaser, but takes subject to the equities of the party in possession.

Deed.—One may convey his interest in real estate even if he have no title of record.

Evidence.—The endorsement of satisfaction on a lease, written by the orators' grantor, was properly admitted as evidence that the lease was paid, especially as the endorsement was followed by the delivery of the lease to the party interested.

Southeast read for *southwest*, herein following *Rutland R. Co.* v. *Chaffee*, 71 Vt. 84.

Evidence.—An unexecuted deed and note prepared by the orator as executor was properly received in evidence against the estate upon the question whether the estate was then making claim to the disputed tract.

Adverse Possession.—The master having found that the defendant and his grantor held the premises adversely, the mere fact that the eaves and cornice of the orators' building have always projected over the right of way and premises in dispute a distance of from twelve to eighteen inches does not entitle the orators to an injunction against the defendant's interfering therewith, for in case of such interference the orators have an adequate remedy at law.

Adverse Possession.—The fact that the orators' tenants occupied a portion of the disputed land under leave and license from the defendant had a tendency to establish that the defendant was then in possession claiming the lands adversely, and the fact was admissible, for the tenants were not tenants of the orators as to the disputed tract, and were not questioning their landlord's title.

Evidence.—The grand list showing that the property was assessed to the defendant's grantor was admissible, not as evidence of possession but to rebut the orators' testimony that the taxes were paid by them.

Witness—Other Party to Contract Dead.—A grantor in the defendant's chain of title was not "a party to the contract or cause of action in issue and on trial" within the statute which excludes such party from testifying when the other party is dead.

Evidence.—Declarations of persons occupying the orators' premises and using the disputed tract of land, that they did so by permission of the defendant's grantor, were admissible as characterizing their acts of occupation and as a part thereof.

CHANCERY. Heard at the March term, 1898, Franklin county, on pleadings, master's report, orators' exceptions thereto and motions to suppress and recommit, before *Rowell*, Chancellor, who overruled the motions, accepted the report and dismissed the bill with costs. The orators excepted.

Following is an extract from the report: "The premises in controversy consist of a small tract of land situate in the rear of a brick building that stands on the highway running easterly and westerly through Fairfax village, and between the rear of said brick building and a small stream known as Mill brook, and of a right of way nine feet wide between said brick building and the building next westerly thereof, (which is the store owned and occupied by the defendant), running back from the highway a distance of fifty feet. The brick building was erected some fifty years ago and the premises have been ever since and are now occupied by the orators, or some of them, or their tenants, and by those through whom they claim to derive title. They, or some of them, also claim title to the strip of land in the rear of the brick building and to the right of way above referred to, as appurtenant to and a part of the premises on which the brick building stands. The defendant, and those through whom he claims to derive title, and their tenants, have on the other hand for a long period of years occupied the premises next westerly, on which the defendant's store building stands as aforesaid; and the defendant claims title to the premises and right of way in dispute as appurtenant to and a part of the land owned by him. The brick building has a frontage of about thirty-six feet and is about forty-two feet in depth. The brick-store lot and the strip of land in dispute are bounded easterly by lands of the M. E. church of Fairfax, on which is a line of sheds built close to the easterly line of the land in dispute. The dimensions of the land in dispute are about seventy by ninety feet."

As to number one of the sixteen claimed errors of the

master mentioned in the opinion, the finding was that said Hubbell on September 15, 1886, assigned the lease to said A. J. Sowles; that the assignment was duly executed and acknowledged but not recorded in the town records of Fairfax until September 24, 1897, after the bringing of this suit and the master found, if he might so find as a conclusion of fact, that by virtue of said assignment all Hubbell's right, title and interest under and by virtue of the lease became vested in said Sowles.

As to number seven of the claimed errors the master found, that whether the word were southeast or southwest the description would in neither event include any portion of the premises in dispute, but would include the brick store.

As to number eight of the claimed errors the master found, that in November, 1878, the orator Edward A. Sowles, in his own handwriting, drafted a note, and mortgage securing the same, and sent them to A. D. Farnsworth to execute, and in this mortgage used a description militating against his position in the present case.

E. A. Sowles for the orators.

Ballard & Burleson for the defendant.

TAFT, J. The orators' title, if any, to the disputed land was derived through Hiram Bellows, and they claim he had title through certain deeds:

(1) From Weaver and wife to A. J. Soule, 7 October, 1851.

No title can be derived from such source, as the description in the deed does not include any portion of the disputed tract.

(2) Rufus Stearns, warranty deed to Hiram Bellows, 1 November, 1853.

The latter's rights under the deed depend upon its character,—whether absolute, or, conditional by way of mortgage. It was a warranty deed in form, but no doubt can be entertained, upon reading the report of the master,

but that it was in fact, a mortgage, and in his findings he so treats it. It is the only construction we can give the facts reported. Stearns conveyed the disputed tract to Bellows, and, as a part of the same transaction, Bellows leased the same premises to Stearns for ten years, at an annual rental of twenty-six and sixty-one one-hundredths dollars, giving Stearns the right at the end of any year, no rent at the time being unpaid, to purchase the premises for two hundred sixty-six and fourteen-one-hundredths dollars. The latter sum, evidently, was the amount of a loan and the annual rental, twenty-six and sixty-one one-hundredths dollars, ten per cent. upon the principal. Within one month thereafter, Stearns conveyed a small tract of the land,—between three and four square rods, by warranty deed to some person in trust for the Methodist society. In December of the following year, he conveyed the rest of the premises to one Hubbell, by warranty deed, and on the same day assigned the lease from Bellows to said Hubbell. In the deed to Hubbell, Stearns warrants the premises free from incumbrance, "except to said Bellows, of two hundred dollars."

The master finds that on 19 March, 1864, the lease to Stearns from Bellows was fully paid and satisfied and was so entered on one of the original duplicate leases by Bellows himself. It is beyond question, therefore, that Bellows acquired no title to, nor interest in, the disputed tract by virtue of the deed from Stearns, dated 1 November, 1853, save the title and interest of a mortgagee.

(3) A. J. Soule's deed to I. N. and G. H. Soule, 5 May, 1854, and

(4) I. N. and G. H. Soule's deed to Bellows, 15 December, 1855.

In respect to these two deeds, the orators claim that the disputed tract is included in the description, for this reason; —the land is described as "being about one-eighth of an acre of land, etc. . . bounded northwardly, northeastwardly and northwestwardly, by land owned by Rufus Stearns;

and eastwardly, by the Methodist meeting house lot; and southwardly, by the highway."

The orators claim that by this description, the grantees cannot take "about one-eighth of an acre" unless they take the disputed tract, being a portion of the Stearns land; that in order to get their "one-eighth of an acre," they must take a part of the land then belonging to Stearns. Their claim in this respect is true. The master finds that the brick-store lot contains about one-sixteenth of an acre. That is the area of the lot as bounded in the deed. The description in the deed must be governed by the boundaries and not by the usual expression so common in conveyances, —"being about," etc. It is clear the description cannot be construed as including any of the Stearns land. Monuments control courses, distances, and general terms, used in the description of lands in deeds, and the rule is always applicable when it effectuates the intention of the grantors as shown by the deed. *Fullam* v. *Foster*, 68 Vt. 590, and many Vermont cases therein cited.

The authority cited by the orators to maintain their claimed construction of the deed is *Pierce* v. *Brown*, 24 Vt. 165. That case is not analagous in any respect to this. In that, the general description was, "containing about forty acres of land." The line which created the uncertainty was, "thence east on M. Pendleton's south line to Hiram Brown's land." Pendleton's south line reached Brown's land in two places, and the court said, "the calls of the deed can be answered and the land included or excluded on an equally reasonable construction of the deed." If the line terminated at the first corner of the Brown land, the conveyance was of thirty-two acres only; if at the second corner, it included forty-one acres. The court, therefore, in construing the deed, used the expression, of "about forty acres," and gave effect to it so as to answer all the calls of the deed and manifestly carry into effect the intent of the grantor to convey about forty acres. In this case the

boundaries of the land conveyed cannot be extended beyond the lines of the Stearns land.

After A. J. Soule conveyed the orators' store and lot to I. N. and G. H. Soule and the latter conveyed to Bellows, A. J. Soule bought the premises owned by the defendant, including the tract in question, and the orators claim that the tract in question, being included in the descriptions in the deeds from A. J. Soule to I. N. and G. H. Soule and from the latter to Bellows, passed to Bellows when A. J. Soule subsequently bought the disputed tract,—that the conveyance to A. J. Soule fed the estoppel created by the covenants in his deed to the grantors of Bellows. This well-established rule invoked by the orators, cannot aid them, for the land in dispute was never conveyed by Soule to Bellows, as we have above held that the deed covered none of the disputed land.

We are further confirmed in our view that the deed from Stearns to Bellows, 1 November, 1853, was a mortgage, from the fact that at subsequent periods, Bellows took from the then owners of the premises, three different mortgages of the same land that Stearns conveyed to him—it is improbable that Bellows would accept a mortgage of lands that he at the time absolutely owned, to secure a debt due him—and that subsequently he executed a warranty deed of the same premises to one Bingham, and then, having acquired some farther mortgage interest in the premises, he quit-claimed the premises, including the right of way, to one Farnsworth. Bingham and Farnsworth were owners of the premises in the defendant's chain of title. It is, then, beyond dispute that if Bellows did acquire any interest in the Stearns land by virtue of Stearns's deed, 1 November, 1853, he virtually conveyed such interest away, more than thirty years since.

The orators claim that the master made sixteen errors in his rulings as to evidence and findings of fact, and we will notice them in the order in which they are stated in the orators' brief.

(1) The facts reported fully justified the finding of the master that by the assignment from Hubbell to Soule the former's interest in the premises passed to the latter.

(2) The orators claim that Brush's title, derived from the assignment and quit-claim of Hubbell, could not affect the title of the oratrix, Susan B., as she was a *bona-fide* purchaser from Dewey, a like *bona-fide* purchaser at the marshal's sale.

It is enough to say in this connection, that, as we construe the deeds from the marshal to Dewey and from Dewey to Susan B., they do not include the land in dispute. But if they did, the land, at the time, being in the adverse possession of another, the grantee would not be a *bona-fide* purchaser, but would take subject to the equities of the one in possession. See Roberts's Dig. 538, under the head, "Possession, Effect of as notice."

(3) The deed from Soule to Brush was properly admitted. The objection that he had no title nor interest of record, if true, was not tenable. He could convey any interest he had in the premises if his right and interest were not of record.

(4–5) The indorsement on the back of the lease written by Mr. Bellows was properly admitted as tending to show that the lease was fully paid. It was in the nature of an admission by him, written with his own hand, and, followed by a delivery of it to the party interested, was competent evidence against him.

(6) The assignment of the lease by Hubbell to Soule was properly admitted for the purpose of showing that Hubbell's interest was conveyed to, and vested in, Soule.

(7) As to authority for reading *southeast* as *southwest*, see *Rutland R. Co.* v. *Chaffee*, 71 Vt. 84. There was no error in this respect.

(8) The unexecuted deed and note prepared by the orator, Edward A., was properly in evidence and was pertinent upon the question, whether Bellows's estate was making claim to the disputed tract. If it was admissible against

the executor of Bellows's estate, it was properly in the case. And it does not appear that it was used to the prejudice of the rights of the oratrix, Susan B., if it was objectionable in that respect, which it is unnecessary for us to decide.

(9) The deed from Brush to Bellows of "all the land described in a deed from Rufus Stearns to Hiram Bellows" was pertinent upon the question whether the same land was conveyed by both deeds.

(10–11) The master did not err in finding the facts stated in points ten and eleven, for there was testimony in the case tending to establish such facts, and we cannot revise his findings.

(12) The orators claim that the master erred in finding the defendant or his grantors held the premises adversely, because the orators and their grantors had been in the adverse possession of a part of the premises,—i. e. the land covered by the eaves, cornice and steps of the brick store, etc.

The master finds, in substance, that the defendant and his grantors held the premises adversely; but the eaves and cornice of the brick store building have always projected over the right of way and premises in dispute, a distance of from twelve to eighteen inches.

The right of the orators to maintain the eaves and cornice, under this finding of the master, cannot be interfered with by the defendant. No injunction against the defendant is necessary to protect the rights of the orators in respect to the eaves and cornice; for any interference therewith by the defendant, the orators will have ample remedy in an action of trespass, and the bill may be dismissed without prejudice to the orators' rights thereto.

(13) It is unnecessary for this court to point out testimony tending to show an adverse use of the premises by the defendant and those under whom he claims. The record is full in that respect. There can be no question in regard to it.

(14) If the orators' tenants in the brick store occupied the disputed land for any purposes, under leave and license of the defendant or his grantors, it would have a tendency to establish that the defendant was then in possession, claiming the lands adversely. It does not appear that the orators' tenants of the brick store ever had any right from the orators to occupy the disputed tract or that the orators ever pretended to lease to their tenants in the brick store any rights in the disputed land. The rule invoked by the orators might apply in case the orators' tenants were leasing from the defendant what they had already leased from the orators, and were already enjoying and possessing under them; but such is not the fact. They leased the orators' store and in addition and outside of the orators' lease to them, leased some rights in the defendant's land adjoining.

(15) This question as to the construction of the conveyances by which the brick store passed to Bellows has already been disposed of by the holding that no part of the Stearns land passed under the description of "about one-eighth of an acre of land with the brick building thereon standing."

(16) It is claimed that the master erred in admitting the testimony tending to show that the property was assessed to Farnsworth. The objection made to its admission was that the grand list was no evidence of possession of the land. The testimony was not admitted for that purpose, but to rebut the testimony of the orators that the taxes were paid by them.

As it is for the claimed errors already mentioned that the orators insist the report should be recommitted, and as we have found no error heretofore, it is unnecessary to further consider the motion to recommit.

The orators' moved to suppress certain parts of the testimony; but we think the motion was properly overruled.

(1) They claim that Brush was an incompetent witness, under the statute which excludes one who is a party to the

contract or cause of action in issue and on trial, when the other party is dead. Brush was a party in the defendant's chain of title, but was in no sense a party to the contract or cause of action in issue and on trial. He was competent notwithstanding the statute.

(2) The second point under the motion to suppress has already been disposed of by points four and five relating to the evidence.

(3) The report does not show the admission of any hearsay testimony referrred to in the motion to suppress the declarations of the persons who occupied the brick store, while they were occupying it and when they were using the disputed tract of land, that they did so by permission of Farnsworth, was admissible. Their declarations characterized their acts of occupation and were part thereof.

Decree reversed and cause remanded with a mandate that the bill be dismissed without prejudice to the orators' rights to maintain the eaves and cornice of their buildings described in their bill. In all other respects the decree is affirmed and remanded.

JOHN MORRILL & CO. *vs.* NEW ENGLAND FIRE INSURANCE COMPANY.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed April 29, 1899.

Insurance—Limitation of Actions.—After the loss under a fire insurance policy had been adjusted, the company, in settlement, sent the insured several drafts upon itself, one at sight and the others on time. The insured accepted and used the sight draft, but returned the others with a request that they be so endorsed as to make all due upon default in payment of

either. The company retained the drafts without making the endorsement, or any payment thereof, but without withdrawing its offer. *Held*, that the insured was barred by a stipulation in the policy, that no action should be maintained upon any claim by virtue of the policy unless commenced within twelve months from the date of the loss.

No Estoppel.—The case is distinguishable from those in which the insured has allowed the period within which action might be brought to lapse relying upon the conduct of the company, which has led him to believe that the loss would be paid without suit.

Offer Must Be Accepted in Terms.—The return of the drafts with a request for the endorsement, was a rejection of the offer and the making of a counter proposition, and the insured cannot now treat the offer as having been accepted.

Acceptance—Payment pro tanto.—The acceptance of the sight draft operated only as a payment *pro tanto*, not as an acceptance of the proposition.

GENERAL and special assumpsit. Heard on an agreed statement of facts, at the March term, 1898, Rutland county, *Start*, J., presiding. Judgment for the plaintiff. The defendant excepted.

Butler & Moloney for the defendant.

The action is based upon a "claim by virtue of the policy," and is barred by the stipulation that the action should be commenced within twelve months from the date of loss.

The proposition was a conditional one and was rejected. Nowhere is it claimed in the agreed statement that the plaintiffs were in any way misled or that the defendants perpetrated any fraud upon them, or that the delay was in reliance upon any act or representation of the defendant.

G. L. Rice and *G. E. Lawrence* for the plaintiff.

The adjustment of a loss and promise to pay the same is a waiver of the limitation contained in the policy. Beach on Fire Insurance 1271; *Metropolitan Life Insurance Co.* v. *Dempsey*, 72 Md. 288.

The drafts were not to become due until after the expiration of the period of limitation, and the proposition of the company has never been withdrawn. Therefore the limitation in the policy was waived.

The plaintiff is entitled to recover on the drafts, and the promise of the company contained in its letter accompanying the drafts. The plaintiffs by accepting and using the sight draft accepted the proposition as made by the defendant, and although they returned the drafts with the request that they be endorsed with a certain agreement, the drafts remained and still remain the property of the plaintiffs. They could not use the sight draft without binding themselves in law to accept all the drafts. The plaintiffs did not refuse to accept the drafts but merely returned them with a request that they be endorsed in a certain way.

The sending of the drafts with the letter enclosing them and the acceptance and use of one of the drafts by the plaintiffs constitute a completed contract between the parties which could not be rescinded without the consent of both. *Porter* v. *Mutual Life Ins. Co. of N. Y.*, 70 Vt. 504; *Smith* v. *Glen's Falls Ins. Co.*, 62 N. Y. 85; Wood on Fire Insurance, 733. This is really an action upon the drafts, and the proposition never having been withdrawn was open at the time the suit was brought.

TYLER, J. The statement of facts shows that the defendant, by its policy of fire insurance, insured to the amount of one thousand dollars, certain personal property of the plaintiffs, situated in their establishment for packing and curing meats, etc., in Ottumwa, Ia. On July 12, 1893, while the policy was in force, a fire occurred by which the plaintiffs suffered a heavy loss upon the property so insured, of which they gave the defendant due notice. Some correspondence took place between the parties upon the subject of the loss, which resulted in an adjustment of the same. On March 10, 1894, the defendant, by its secretary, wrote the plaintiffs: "We hand you drafts for loss and interest, under policy No. 27,015, with the interest on the same, and we trust that you will find the same correct. These items will be paid when due: . . . Drafts, one hundred dollars, due at sight; two hundred and twenty-

three dollars, due May 10th; two hundred and twenty-four dollars, due June 10th; two hundred and twenty-five dollars, due July 10th; two hundred and twenty-seven dollars, due August 10th."

The drafts were drawn by the defendant upon itself and made payable to the plaintiffs. On receipt, the plaintiffs used the sight draft by sending it through the banks for collection, and it was paid by the defendant. The plaintiffs immediately returned the other four drafts to the defendant by letter, saying in substance that they enclosed them, and requesting the defendant to indorse upon each of them the following: "This note becomes due, should any of the other notes of this series, numbered respectively 1908, 1909, 1910, 1911, not be paid at maturity." The plaintiffs further requested that the drafts be returned to them when so indorsed. The four drafts were received by the defendants after their payment of the one-hundred-dollar draft. The defendant did not indorse the four drafts, nor return them, nor pay them to the plaintiffs, though several times requested to pay them before this suit was brought, which was on June 7, 1897, nor had the defendant withdrawn its proposition to pay the loss as stated in its letter of March 10, 1894, and as expressed in the drafts.

It was clearly competent for the parties to the contract of insurance to stipulate in respect to the time within which a suit should be brought by the insured against the defendant after a loss occurred, and take the case out of the statutory time for bringing such actions, and they did so contract by the seventh condition in the policy which reads: "That no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity until after full compliance by the insured with all conditions and requirements printed and written on this policy, nor unless such action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against

this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

(1) As the suit was not brought until more than four years had elapsed from the occurrence of the loss and more than three years from proof thereof, the plaintiffs had lost their right of action unless the defendant, by its conduct in adjusting the loss and giving the drafts, induced the plaintiffs to delay bringing their suit, or waived the seventh condition in the policy, so that the plaintiffs might bring suit at any time within six years from proof of loss.

It is unquestionably the law that any line of action on the part of the defendant which led the plaintiffs reasonably to believe that their claim would be paid without suit would estop the defendant from setting up the limitation provided in the policy. They would not be permitted to hold out the hope of payment and thus cause the plaintiffs to delay suit until the limited time had expired, and then interpose the condition in the policy in defense to an action. *Mickey* v. *Insurance Company*, 35 Ia. 174. But it does not appear that the plaintiffs were misled by the defendant's action in the premises, nor that they were by such action induced to delay bringing suit beyond the time fixed by the contract. Four of the twelve months within which a suit might have been brought remained when the plaintiffs returned the drafts to the defendant for indorsement, and the case does not show that the plaintiffs believed during all that time that their claim would be paid without suit. In all the cases cited upon the plaintiffs' brief it affirmatively appeared that the plaintiffs were misled by the defendant's conduct and omitted to bring suit in consequence of such conduct.

(2) The plaintiffs cannot recover upon the drafts, for they did not accept them. After the amount of the loss was agreed upon the defendant sent the plaintiffs the five drafts for their acceptance in payment, which the plaintiffs might

have accepted and recovered upon as they fell due. Instead of accepting them they returned four of them to the defendant, and in effect refused acceptance unless they were indorsed by the defendant in the manner indicated, which indorsement the defendant refused to make. If the offer had been accepted the defendant's liability upon the drafts would have beeen substituted for that upon the policy, and a new legal relation would have existed between the parties; but to create a new contract the acceptance must have been unconditional, absolute, and identical with the terms of the offer. An acceptance is held insufficient when any term of the proposed contract, as for instance, the time allowed for a deferred payment, is left for future consideration and adjustment. Benj. on Prin. of Cont., 12, 13. The defendant's offer was met by a counter offer and neither was accepted. The plaintiffs having rejected the defendant's offer cannot now claim an acceptance of it. The counter proposal was a virtual rejection of the original proposal. *National Bank* v. *Hall*, 101 U. S. 43. Therefore no new promise is shown upon which the plaintiffs can sustain an action. *Hartford S. B. I. & I. Co.* v. *Lasher Stocking Co.*, 66 Vt. 445; *Hoyt* v. *Coate*, 67 Vt. 559. The acceptance of the sight draft only operated as a payment *pro tanto*. In *Met. Life Insurance Company* v. *Dempsey*, 72 Md. 288: 19 Atl. R., 642, there was an agreement upon the amount to be paid and a promise by the superintendent, who had authority, to pay the amount as soon as he could obtain it from the Company. And in *Smith* v. *Insurance Company*, 62 N. Y. 85, the loss was agreed upon and a promise made by the defendant to the plaintiff to pay him the amount in consideration of his having surrendered his policy. In all the cases cited it will be found that there were new promises upon which the plaintiffs might sue irrespective of the limitations in the policies.

Upon a careful examination of the record we are unable to

find any ground upon which the plaintiffs can recover, and must hold that the lapse of the time stipulated in the policy is a fatal bar to the plaintiffs' right of action.

Judgment reversed and judgment for defendant.

W. O. STANDISH, et al. *vs.* THE CITY OF MONTPELIER and TOWN OF BERLIN.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed April 29, 1899.

Report of Commissioners—Refusal to Recommit.—The county court properly refused to recommit a report of commissioners upon the motion of a party who had had his day in court.

PROCEEDINGS to lay out a highway. Heard upon the report of commissioners, exceptions thereto and motion to recommit the same, at the September term, 1898, Washington county, *Start*, J., presiding. *Pro-forma* judgment overruling the motion and exceptions and accepting the report with the usual orders. The Montpelier & Wells River Railroad excepted.

The Montpelier & Wells River Railroad moved to recommit the report for the purpose of having the commissioners find the amount of damages said railroad would be entitled to if the proposed highway should be established across its track at grade.

J. P. Lamson for the Montpelier & Wells River Railroad.

Fred L. Laird and *T. R. Gordon* for the petitioners.

TYLER, J. This case comes here upon exceptions by the

Wells River Railroad Company to the ruling of the court below denying its motion to recommit the commissioners' report, to the overruling of its exceptions to the report and to the acceptance of the same. The only exception insisted upon in the brief and argument is that to the refusal of the court to recommit the report.

The commissioners, after a full hearing, found and reported, that the public good and the convenience and necessity of individuals required the laying of the proposed highway across the track of the Wells River Railroad Company and they expressed the opinion that it should be laid at grade. They also found and reported that it would be impracticable to build the highway under the railroad, and that in view of the difficulty and expense of constructing an over-grade crossing, such a crossing was not required.

The Railroad Company had notice of and was present by its counsel at the hearings, and had ample opportunity to present its claim for damages to the commissioners. Without deciding what damages, if any, the Railroad Company might have recovered, if it had presented a claim therefor, we must refuse to order the report recommitted for the reason that the Company has had its day in court.

Judgment affirmed.

HARDWICK SAVINGS BANK AND TRUST COMPANY *vs.* R. F. DRENAN.

January Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed April 29, 1899.

Estoppel.—In an action against the surety upon a bond given to the plaintiff bank as security for loans to be made by the bank to the principals upon the bond, the defendant claimed that it had been agreed between the principals and the defendant that another surety should be procured before the bond was used, and that the plaintiff, through one of its directors, had notice of the fact before it accepted the bond. *Held*, that if this claim were established the bank would be estopped.

Evidence.—The defendant offered to show a conversation between a witness and a director, in which the director said that if the principals did not get another signer to the bond, the bank would take a mortgage in place of such other signer. The plaintiff claimed that the evidence tended to show that this conversation took place, if at all, after the bond had been accepted and the loans made on the strength of it; the defendant claimed that the evidence tended to show that it occurred before. *Held*, that the offer should have been admitted, for if the conversation occurred before, it tended to show that the plaintiff had notice of the agreement, and it was for the jury to say when it occurred.

Evidence—Duty to Deny.—The principals failed, and were adjudged insolvent. Thereafter a director of the plaintiff interviewed the defendant, and the plaintiff was allowed to show that in that interview while the director was trying to persuade the defendant to sign notes with one of the principals to take care of the bond indebtedness, the defendant made no claim that he was excused. *Held*, that error does not appear in this, for the circumstances, which are only stated in substance, may have been such as to require the defendant's denial of liability and to make his silence unnatural.

Evidence.—It was immaterial whether the assignee in insolvency disposed of the estate to the best advantage, although he was one of the directors of the plaintiff, for the case shows that he was acting as assignee and not as director, and the plaintiff is not responsible for his conduct.

DEBT ON BOND. General issue and notice. Trial by jury, at the June term, 1897, Caledonia county, *Taft*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The paragraph in the bill of exceptions relating to the interview between McLoud and the defendant is as follows:

Said McLoud was a witness for the plaintiff and was allowed to testify against the defendant's objection and exception that upon an occasion in the summer following the failure of Beede and Dow, when the witness and the defendant were discussing an arrangement with reference to the giving of certain notes by Drenan to be signed by Beede and the defendant in settlement of the bond indebtedness, the defendant made no claim but that he was liable upon the bond, nor that there was to have been another surety thereon.

The defendant offered to show that the goods and real estate of the insolvents were sold at a sacrifice. The offer was excluded and the defendant excepted. The defendants requested the court to charge that the action of McLoud, being a director of the plaintiff, in selling goods to said Johnson, another director, was in itself suspicious and put the burden on the plaintiff of proving such sale to have been advantageous and for full value, and that if McLoud sold the property mortgaged to the bank to another director of the bank, for less than its fair cash value, it released the defendant as surety to the extent of such loss to the bank. The court declined to charge according to these requests and the defendant excepted.

George M. Powers and *J. P. Lamson* for the defendant.

Taylor & Dutton and *W. P. Stafford* for the plaintiff.

TYLER, J. The plaintiff's evidence tended to show that in August, 1894, George A. Beede and George A. Dow formed a partnership for the purpose of carrying on a mercantile business in East Hardwick; that they purchased a store and arranged with the Merchants National Bank of St. Johnsbury to loan them money and to take their bond as security; that the bond was prepared, in which their names appeared as principals, a blank space being left for

the names of the sureties; that the bond was signed and sealed by Beede and Dow as principals, and by the defendant as surety; that the words, "one life insurance policy of George A. Dow," were written in the blank space in the place for the name of one surety, which was done before the bond was executed, with the defendant's knowledge and consent; that the bond was never delivered to the Merchants Bank, Beede and Dow arranging with the plaintiff bank through George L. Johnson, one of its directors, who resided at East Hardwick, and attended to its business there, to obtain their loans from the plaintiff; that the defendant consented in writing to the change; that the bond was altered so as to run to the plaintiff, and was delivered to it August 29, 1894; that the plaintiff had no knowledge of an agreement between the defendant and Beede and Dow that the bond should not be delivered until another surety had been obtained, and denied that there was such an agreement in fact; that no one in behalf of the plaintiff attempted to secure additional sureties to the bond prior to the advancement of the fifteen hundred dollars.

The bond was not delivered to the Merchants Bank, and there was no evidence that it consented to take a life insurance policy in place of a surety for Dow.

The plaintiff's evidence further tended to show that on August 29, 1894, Beede and Dow gave the plaintiff their note for fifteen hundred dollars, and on September 24, 1894, their note for four hundred and twenty-five dollars, and the plaintiff credited them those sums respectively, and allowed them to check against them; that before accepting the bond, the plaintiff made inquiries concerning the defendant, and becoming satisfied that his name was good for the amount of the bond, accepted it, and made the advances on his credit; that when credit was given for the first note, the plaintiff expected that no further loan would be required, and when application was made for another loan, it required further security, and the bond was then entrusted

to Beede and Dow, who attempted to procure other sureties, and failing in this, on September 18, 1894, gave the plaintiff a chattel mortgage upon their stock of goods as additional security.

Beede and Dow became insolvent, and were so adjudged, and their estate was settled in the court of insolvency. After the application of certain credits and a dividend in insolvency, a large sum still remained due upon the notes.

The defendant's evidence tended to show that Beede and Dow had agreed between themselves that each should furnish a surety upon the bond; that Beede should procure the defendant as his surety, and Dow his father as his surety; that when Beede, Dow and the defendant met to sign the bond, Dow's father was away from home, and the bond was left with Dow to procure his father's signature, with an agreement between Beede, Dow and the defendant that the bond should not be used until Dow's father had signed; that the words referring to the insurance policy were not in the bond when the defendant signed it, and were never written there with his knowledge and consent, but were inserted by Johnson afterwards; that at that time Johnson was informed by Beede and Dow that the bond was not to be used until Dow had procured his surety; and before the bond was delivered to Johnson, Dow and Johnson both tried to get another signer on the bond; that the defendant did not know that Dow's father had not signed the bond, nor that the policy had been substituted until after the plaintiff had made its advancements to Beede and Dow; that the taking of the chattel mortgage by the plaintiff was without the defendant's procurement; that the plaintiff took possession of the goods under the chattel mortgage soon after Beede and Dow went into insolvency.

(1) It is a sound proposition, that if an agreement was made between Dow, Beede and the defendant when the latter signed the bond, that it was not to be used until Dow procured a surety to sign it in his behalf, and the plaintiff

knew of the agreement when it accepted the bond, it would be such a fraud upon the defendant that the plaintiff cannot enforce the bond against him. This was the principal issue made at the trial, whether the plaintiff had such knowledge before it accepted the bond. It is not claimed by the defendant that the plaintiff had any knowledge of that fact unless it was chargeable with the knowledge that Johnson possessed.

The plaintiff's evidence showed that Johnson "looked after" its business in East Hardwick, and it may be assumed that he did so by the authority of the board of directors or with their acquiescence, and making loans was surely within the sphere of the plaintiff's business and consequently within the line of duty of the directors. It was held in *Foot & Hodges* v. *R. R. Co.*, 32 Vt. 633, that the action of directors, though acting separately, if in the usual sphere of directors, binds the corporation, but it is unnecessary to go to that extent in the present case, for no point was made by the plaintiff in its brief or argument that director Johnson had not authority to negotiate this loan and arrange the security. The main issue of fact below was whether Johnson knew of the agreement between the principals and the surety before he accepted the bond. Upon this question evidence of a conversation was admitted between Johnson and the witness Norcross relative to another surety upon the bond, the defendant claiming the conversation was before the bond was delivered to the plaintiff, while the plaintiff claimed it was after that time. The defendant offered to show that at the time of this conversation Johnson told the witness "that if they did not get another signer to the bond the bank would take a chattel mortgage upon the goods in place of the other signer," which offer was excluded. It was for the jury to decide when the conversation occurred with reference to the delivery of the bond. If it was before, the evidence offered tended to show that Johnson knew of the agreement as claimed by the

defendant, and its exclusion was error, and clearly so in connection with evidence introduced by the defendant tending to show that before the bond was delivered Dow and Johnson both tried to obtain another signer upon it.

In view of Johnson's undisputed connection with the plaintiff and with the taking of the loan we think the excluded evidence had a tendency to show that the plaintiff had learned, through Johnson, of the agreement between the principals and the defendant before it took the bond. Notice to him was, in the circumstances, notice to the plaintiff. None of the other exceptions insisted upon by the defendant, are sustainable.

(2) From what appears in the exceptions we cannot say it was not unnatural that the defendant should have said he was not liable upon the bond if that was his claim. McLoud as the assignee in insolvency was trying to induce the defendant to give notes with Beede for the remainder due the plaintiff from Beede and Dow upon the bond indebtedness. The circumstances attending the conversation—which is only given in substance—may have been such as to require the defendant's denial that he was liable upon the bond and render his silence unnatural.

(3) It was not error to exclude the evidence offered which tended to show that the assignee did not dispose of the estates of Beede and Dow to as good advantage as he might have done. He was one of the plaintiff's directors, but the case shows that in what he did with the property he acted as assignee under the direction of the court of insolvency, and not as an officer of the plaintiff, which cannot, therefore, be affected by his action in that behalf.

(4) What Dow said to the witness Norcross when soliciting him to sign the bond as surety, no one representing the plaintiff being present, was not admissible upon any ground.

Judgment reversed and cause remanded.

E. M. CRANE *vs.* S. E. DARLING.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and WATSON, JJ.

Opinion filed May 3, 1899.

Demurrer—Exception.—It being conceded in argument, although not shown by the record, that the question raised in the supreme court was not made on the demurrer below, the question will not be considered.

Slander of a Physician without Recorded License.—A physician whose license has been duly recorded before the speaking of the slanderous words may have his action therefor, although his license was not recorded at the time to which the slanderous words referred, and although the statute prescribes a penalty for practicing before the license is recorded, if, as in this case, the words used charge the plaintiff with general professional ignorance and incompetency and use the case referred to merely as an illustration of the charge.

Innuendoes.—The court entertains no doubt that the words declared upon are susceptible of the meaning ascribed by the innuendoes.

Charge—Exception.—A party who secures the charge he asks for is not entitled to object that there is no evidence to which it can apply.

Slanderer's Liability for Subsequent Circulation.—The testimony of the plaintiff tended to show that the slanderous words were widely circulated, but there was nothing to show that the defendant had anything to do with their circulation otherwise than by making them in the first place. The defendant requested the court to charge that he was not liable for any circulation by others unless procured by him, and the court complied only by saying that the plaintiff could recover only such damages as he had sustained by reason of such circulation as could be traced to the defendant. *Held*, without considering the soundness of either the charge or the request, that the request was substantially complied with.

Charge—Damages.—The charge is not construed as treating the repetition of the slanderous words by others as an additional ground of recovery, but only as a ground for additional damages consequent upon the greater extent of injury occasioned thereby, and therefore it is held proper, herein following *Knott and Wife* v. *Stoddard*, 38 Vt. 35.

Entrapping the Defendant into a Slander.—The exception of the defendant to permitting the plaintiff to testify in chief to a conversation with the defendant, because the plaintiff sought the interview for the purpose of entrapping the defendant into a slander, was premature and unavailing, as the testimony tending to show that fact was not elicited until the

cross-examination, which was the proper time to have called the matter to the attention of the court.

Circulation of Slander—Party Fulfilling his Offer to Connect Evidence.—If the plaintiff was bound to fulfill his offer to show that the subsequent circulation of the slander was without participation on his part, this court is not prepared to say that he did not do so, as it does not appear exactly what he said, but only that in making inquiries he himself talked about the matter.

Meaning of Words—Province of Jury.—In actions for slander it is for the jury to say what the words meant, however they may have been understood by the hearers.

SLANDER. General issue. Trial by jury, at the December term, 1897, Caledonia county, *Thompson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The words were alleged to have been spoken of and concerning the plaintiff in his professional capacity as a physician and with the innuendoes stated in the opinion of the court. The words were, "The Currier boy died from the effects of iron which you injected into his nose; you killed the Currier boy by injecting iron into his nose; you killed that boy, (meaning said Harry Currier), he died from hemorrhage of the nose and throat caused by your injecting iron; you have been underhanded and dishonest in the means you have used to obtain patients ever since you went into practice; you have broken every rule of the ethical code of physicians in your practice; you are a dishonest, underhanded sneak."

Barber & Darling for the defendant.

Taylor & Dutton for the plaintiff.

ROWELL, J. Though not shown by the record, it is conceded in argument that the only question now made on the demurrer was not made below. This being so, the question cannot be raised thereunder here, for the reason given in *State* v. *Preston*, 48 Vt. 12. It is unnecessary, therefore, to consider whether the order to replead without prejudice to the demurrer is effective to reserve the benefit of it to the demurrant.

The declaration contains three counts, and alleges that before and at the time of speaking the words declared upon, the plaintiff was, and ever since has been, and still is, a physician, and that the words were spoken of and concerning him as such, and of and concerning his treatment of a certain Currier boy. It appeared in evidence that the plaintiff was a graduate of the medical department of the University of Vermont at the time he treated the boy, and was then practicing medicine at Hardwick, and had a license to practice from the Board of Censors of The Vermont Medical Society, but that his license had not been recorded in the *Medical Register* as required by statute, but was recorded therein before the speaking of the words.

The statute is, that if a person practices medicine, and is not duly authorized by a certificate issued and recorded as therein provided, he shall be fined. V. S. 4638. Therefore the defendant claims that the plaintiff could not be slandered in his profession by words spoken after his certificate was recorded, concerning his treatment of the boy before it was recorded, for that the actionable quality of the words must be determined as of the time of that treatment, at which time he was not a physician, as he had no right to practice, and therefore had no professional character as a physician, and that his subsequent authorization did not change his legal status as to prior acts.

But the jury has found, under a charge not excepted to on this point, that the defendant meant to charge the plaintiff with general professional ignorance and incompetency as a physician, and used the case of said boy merely as illustrative of the charge; and also meant to charge him with general professional misconduct and dishonesty in the means habitually resorted to by him to obtain practice. This meaning certainly touched the plaintiff in his profession at the time the words were spoken, and therefore makes them actionable, if they are susceptible of that meaning.

which is the one ascribed to them in the innuendoes; and that they are susceptible of it, we have no doubt.

The court limited recovery to the first and second counts, which declared upon words spoken at Taylor & Dutton's office. The third count, on which recovery was denied, declared upon a part only of what the defendant subsequently said to the plaintiff in a conversation at Kimball's drug-store. All that defendant said at the drug-store was admitted, and it amounted to a repetition of the charge in respect of the treatment of the Currier boy involved in some of the language declared upon in the other counts. The testimony on the part of the plaintiff tended to show that the defendant's statements concerning the treatment of the boy were widely circulated in the community; but there was nothing to show that the defendant had anything to do with their circulation, otherwise than by making them in the first place.

The defendant requested the court to charge that he was not liable for any circulation by others of the alleged slanderous words, unless procured by him. In answer to this request the court charged that the plaintiff could recover only such damages as he had sustained by reason of such circulation of said words as could be traced to the defendant, and did not otherwise comply with the request. The defendant claims that by this charge the jury was allowed to give damages for the speaking of the words in the drug-store, and for such circulation thereof, and of the slanderous words declared upon in the other counts, as could be traced to the defendant, although the third count had been laid out of the case, and the jury told to give it no consideration whatever, as there could be no recovery thereon, and although there was no testimony tending to show that the defendant had anything to do with the circulation of the slanderous words shown in evidence.

But we do not think it can be said that the charge allowed the jury to give damages for the speaking of the

words in the drug-store as a substantive ground of recovery, for both the request and the charge, as we construe them, relate solely to the circulation of the slander by others who were thereunto induced by something that the defendant said or did other than the speaking the words originally.

We also think that the charge was a substantial compliance with the request, saying nothing about the soundness of either. They raised a question of causation, and the proposition of both is, that the defendant must have been the occasioner of the circulation by others in some assignable way other than by speaking the words in the first instance, in order to be responsible therefor. The defendant having gotten what he asked for, cannot now be heard to complain that the testimony did not warrant the charge.

The defendant further claims that whatever else may be said of this part of the charge, it is erroneous in the rule of damages laid down, for that the repetition of slanderous words is admissible only on the question of *animus*, and never as an additional ground of recovery, and that to give it the latter force was error. But, as we have said, the charge does not relate to a repetition of the slander by the defendant, but only to a circulation of it by others, attributable to him as aforesaid; and we do not think it made such circulation an additional ground of recovery, but only a ground of additional damages consequent upon the greater extent of injury occasioned thereby, as it well might, under *Nott and Wife* v. *Stoddard*, 38 Vt. 25.

The exception to permitting the plaintiff to testify in chief to the conversation in the drug-store, because he sought the interview for the purpose of entrapping the defendant into a slander, was premature, as the testimony tending to show that was not elicited till the plaintiff's cross-examination. The testimony, therefore, as against that exception, came into the case properly in the first instance; and if the court

did not deal with it properly after that purpose appeared, then was the time to take advantage of it; but as no such advantage was sought to be taken, unless it was by excepting to the part of charge that was in compliance with the defendant's request, the question is not available.

The claim that the testimony of the plaintiff as to the extent of the circulation of the slander was inadmissible because he did not fulfill his offer to show that the circulation was without participation on his part, is based upon the fact that he testified that he made inquiries of several persons at different places, to find evidence that the defendant had circulated the slander, but could find none, and that in making the inquiries he himself talked about the matter. We cannot say that this shows a non-compliance with the offer. It does not appear what he said, and it cannot be affirmed that he could say nothing about the matter without participating in the circulation.

The defendant moved for a verdict on several grounds, the only one now relied upon being, that the words referred only to the personal relations between the plaintiff and the defendant, and to the treatment that each had received from the other, and were so understood by the hearers, and being so understood, are not actionable.

But if it was competent to show how the hearers understood the words, their understanding was not conclusive, but was only for consideration by the jury, whose province it was to determine their meaning. *Knapp* v. *Fuller*, 55 Vt. 311; *Smith* v. *Miles*, 15 Vt. 245.

Judgment affirmed.

QUIMBY & ROGAN *vs.* BOSTON & MAINE RAILROAD.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed May 6, 1899.

Cattle Guard—V. S. 3871, 3877.—Under V. S. 3871 and 3877 railroads are bound to maintain cattle guards at all road crossings sufficient to prevent cattle and animals from getting upon the track, and are liable for damages to the same done by their agents or engines, if occasioned by want of such guards, whether such animals are upon the road crossing lawfully or not. Such is the logical result of *Harwood* v. *Bennington & Rutland R. R.*, 67 Vt. 664, and all previous decisions contravened hereby are overruled.

CASE. Heard on an agreed statement, at the December term, 1898, Caledonia county, *Start*, J., presiding. Judgment for the defendant. The plaintiff excepted.

Bates, May & Simonds for the plaintiff.

The plaintiffs are entitled to judgment if (1) the duty of the defendant to maintain sufficient cattle guards was absolute, or (2) the mare was unlawfully upon the road crossing, or (3) the case *Harwood* v. *Bennington & Rutland R. R. Co.*, 67 Vt. 664, is sound.

Harry Blodgett and *John Young* for the defendant.

If the plaintiff's theory is sound, this case presents the peculiar conditions in which the owner or keeper of the mare is liable to a fine of twenty dollars under § 3879, by reason of the mare being "found going at large within the limits of a railroad after the same is opened for use," and is also "liable for damages thereby sustained by any person," by reason of the mare being at large upon the railroad; and on the same facts the defendant is liable to the owner or keeper of the mare for her value. Supposing that by this collision the engine had been derailed and ruined, would not

the owner or keeper of the mare have been liable to the defendant, under this section, for the damage to the engine?

It is no answer to this position to say that the mare "escaped without the knowledge of the plaintiffs or their servants."

The statute makes "the person through whose fault or negligence such horse or other beast is so at large," liable.

This mare was at large for one or both of two reasons. Either the mare was breachy and a jumper, or the pasture fence was insufficient. If the mare was a jumper it was the fault or negligence of the plaintiffs that she was turned out to pasture. If the fence around the pasture was insufficient, this was equally the fault of the plaintiffs.

The owners of domestic animals are bound, at their peril, under the laws of this State, to keep their animals at home. *Wilder* v. *Wilder*, 38 Vt. 678.

The decisions in this State, construing and applying the statutes relating to railroad fences and cattle guards, clearly relieve the defendant from any liability, for the death of this mare on the facts stated. *Trow* v. *Vt. Central R. Co.*, 24 Vt. 487. In that case the horse strayed from the highway where it was running at large with the owner's consent and knowledge. The court held that the negligence of the plaintiff in letting his horse run in the highway without restraint, defeated his recovery, even though defendant had not built either fence or cattle guards. *Jackson* v. *Rutland & Burlington R. Co.*, 25 Vt. 150, 155-160; *Morse* v. *Rutland & Burlington R. Co*, 27 Vt. 49; *Bemis* v. *Conn. & Pass. R. Co.*, 42 Vt. 375; *Congdon* v. *Cent. Vt. Railroad Co.*, 56 Vt. 390, 395.

To the same effect are the cases in Massachusetts: *McDonnell* v. *Pittsfield & N. A. R. Co.*, 115 Mass. 564; *Eames* v. *Salem & Lowell R. Co.*, 98 Mass. 560; *Maynard* v. *Boston & Maine R. Co.*, 115 Mass. 458.

In New Hampshire: *Towns* v. *Cheshire R. Co.*, 21 N. H. 363. That case is very similar to the case on trial. It holds

that the mare was not lawfully on the highway. *Cornwall* v. *Sullivan R.*, 28 N. H. 161, 167, (168, 170, 172 and 173) fully endorses the Jackson case above cited.

In New York: *Tonawanda R. Co.* v. *Munger*, 5 Denio 255. In Maine: *Perkins* v. *The Eastern and B. & M. R.*, 29 Me. 307. In Pennsylvania: *N. Y. & Erie* v. *Skinner*, 19 Penn. 298. In Rhode Island: *Tower* v. *Providence & Worcester Railroad*, 2 R. I. 404. In New Jersey: *Vandegrift* v. *Redıker*, 22 N. J. L. (2 Zab.) 185.

The plaintiff in the trial below relied upon *Smith* v. *Barre R. Co.*, 64 Vt. 21; *Wait* v. *Bennington & Rutland R. Co.*, 61 Vt. 268; *Harwood* v. *Bennington & Rutland R. Co.*, 67 Vt. 664. We fail to see wherein either of these cases militates against the doctrine of the cases above cited, or aids the plaintiff in the case at bar. In *Smith* v. *Barre R. Co.*, the horse was legitimately in the field adjoining the railroad track, from which he escaped to the tracks by reason of the lack of a fence which the railroad company were bound to build and maintain against said field because it was an adjoining field. The whole farm of an adjoining proprietor, under this law must be treated as one field, because the railroad company has no right to object to an adjoining owner pasturing his whole farm if he so elects. This case is strictly in accordance with the cases above cited. In the case of *Wait* v. *Bennington & Rutland R. Co.*, the plaintiff was driving his team along the highway. His horses became unmanageable, and escaped from his master, while being driven along in the highway for a legitimate purpose, and ran upon the railroad. In *Harwood* v. *Bennington & Rutland R. Co.*, the servant of the owner was leading the horse along the highway for a legitimate purpose, and while being so led, the horse broke away from the servant and ran upon the railroad.

Each of these cases turns upon the fact that the horse was being rightfully driven or led on the highway when it escaped from the control of the owner or servant. In each

case the animal went rightfully on the highway and under restraint.

THOMPSON, J. During the night of July 5, 1897, without the knowledge of the plaintiffs or their servants, their mare escaped from their pasture, on the "Meserve farm" so called, in St. Johnsbury, at some place not known, into an adjoining mowing field belonging to this farm, and passed from it through an open driveway into the public highway, and after travelling about at large on the highway for about half a mile, passed over a cattle guard in the defendant's railroad where it crossed the highway at grade, and went along the railroad track for some distance and was struck by an engine of the defendant, and so injured as to be worthless and for that reason was killed. The defendant was without fault in the management of its engine at the time the mare was injured. This highway crossing was not on the "Meserve farm," and the cattle guard was not sufficient to prevent animals from getting upon the railroad. The pasture from which the mare escaped was fenced.

The defendant contends that the mare was not lawfully upon the highway; that it is not bound to maintain cattle guards at highway crossings of its railroads sufficient to prevent cattle and animals, not lawfully upon the highway, from getting upon its railroad track, and that consequently the judgment below in its favor was correct. In support of this contention it relies upon several decisions of this court in respect to the duty of railroads to build and maintain fences along the line of their roads.

On the other hand, the plaintiffs insist that under the holding of this court in *Harwood* v. *Bennington & Rutland R. R. Co.*, 67 Vt., 664, they are entitled to recover for the injury to the mare. In that case the facts so far as can be gathered from the opinion were these: While the horse of the plaintiff's intestate was being led along the highway by one Houghton, in whose care it had been placed, it escaped

and ran over a defective cattle guard to the defendant's railroad track, and was there killed. In defence, evidence was offered tending to show that the horse escaped and went at large through the negligence of Houghton, and that this negligence contributed to the accident. This evidence was excluded, and the decision of the county court was sustained by this court. Its decision was put upon the ground that "the statute having made it the duty of the defendant to maintain a cattle guard at the point where the horse escaped from the highway and went upon its track sufficient to prevent horses from getting upon its track, and declared for its neglect to do so it should be held liable for all damages done by its agents and engines, if occasioned by such neglect, the question of whether Houghton was negligent in leading the horse along the highway in the manner he did was immaterial." If the horse escaped through the negligence of Houghton and thus went at large upon the highway, from the moment of its escape, it was unlawfully upon the highway. Hence the logical result of this decision is that railroads are bound under the provisions of V. S. 3871 and 3877, to construct and maintain cattle guards at all road crossings sufficient to prevent cattle and animals from getting on the railroad, and that they are liable for damages done by their agents or engines to cattle, horses or other animals, if occasioned by the want of such cattle guards, without regard to whether such cattle, horses or other animals are lawfully on such road crossing or not. There is no occasion to recede from this decision. It conforms to the express and unambiguous language of the statute. This statute was intended to protect travellers riding in trains on railroads, from accidents that might occur by reason of animals being at large upon the railroad track for want of sufficient cattle guards at road and farm crossings, as well as to compensate owners for cattle injured for want thereof. So far as this case contravenes the cases previously decided by this court relating to this subject, it overrules them.

This view of the case renders it unnecessary to decide whether the mare of the plaintiffs was lawfully or unlawfully upon the highway.

Judgment reversed, and judgment for the plaintiffs to recover two hundred dollars damages and their costs.

NEW ENGLAND FIRE INSURANCE CO. *vs.* DAVID N. HAYNES.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON, and WATSON, JJ.

Opinion filed May 6, 1899.

What is a Demand Note—Statute of Limitations.—A note running to a corporation and payable "in such installments and at such times as the directors may require, notice thereof being published according to the charter," the charter requiring thirty days publication in a newspaper, is not a note payable on demand; and the statute of limitations does not begin to run thereon from its date.

Statute of Limitations—Demand.—When delay in making demand is expressly contemplated, there is no rule of law that requires the demand to be made within the statutory period for bringing an action.

Statute of Limitations—Reasonable Time.—If the statute did begin to run at the expiration of a reasonable time for call and notice, it was for the defendant to have shown as matter of fact that such time had expired, or at least a state of facts upon which the law could assume the limit to have been passed, neither of which was done in this case.

Estoppel.—The defendant, if he did give the note upon the promise that it should be surrendered after certain financial straits had been passed, gave it, as the case shows, for the purpose of enabling the plaintiff to deceive the insurance commissioners as to the plaintiff's financial condition and is estopped from taking advantage of his own fraud.

Legality of Calls—Number of Directors.—The call by the directors was not invalid by reason of the plaintiff's failure to elect fifteen directors, for the charter only required from seven to fifteen, and at all times in question there were more than seven and more than a majority of fifteen concurring in the action taken.

ASSUMPSIT. Pleas, general issue, statute of limitations and notice. Heard on referee's report at the March term, 1898, Rutland county, *Start*, J., presiding. Judgment for the plaintiff. The defendant excepted.

George E. Lawrence, for the defendant, cited *Kingsbury* v. *Butler*, 4 Vt. 458; *Bell* v. *Yates*, 33 Barb. 627; *Howland* v. *Edmonds*, 24 N. Y. 307; *Dawley* v. *Wheeler*, 52 Vt. 574; *Palmer* v. *Palmer*, 36 Mich. 487; *Steele* v. *Steele*, 25 Pa. St. 154; *Morrison* v. *Mullin*, 34 Pa. St. 12; *Lower* v. *Miller*, 66 Ia. 408; *Rhines* v. *Evans*, 66 Pa. St. 195; *Thrall* v. *Mead*, 40 Vt. 540.

Butler & Moloney for the plaintiff.

THOMPSON, J. The plaintiff is an insurance company incorporated by No. 176, St. 1880. It seeks to recover upon the following note, executed and delivered to it by the defendant. "$900. Rutland, Vt., Feb'y 9th, 1885. For value received, I promise to pay to the 'New England Fire Insurance Co.,' at its office in Rutland, Vt., nine hundred dollars, payable in such installments and at such time or times as the Directors may require, notice thereof being published agreeably to the charter." This note was given for twenty shares of stock of the plaintiff company, first issued to the Atlas Guaranty Company, and by it duly transferred and delivered to the defendant. At the time the note in question was given, a part of the assets of the plaintiff consisted of notes commonly referred to as "stock notes," being notes given for its stock by holders thereof, and of similar tenor and import to the note in suit. The makers of these "stock notes" were liable to pay the same whenever assessments were voted thereon by plaintiff's directors, pursuant to its charter and by-laws. Among the "stock notes" so held by the plaintiff, was one for $900 made by the Atlas Guaranty Company, and given for the stock assigned and delivered to the defendant. This note was surrendered to the maker by the plaintiff at the time the

defendant's note was taken, and his note was taken in lieu of the note so surrendered. The defendant then understood that his note was to take the place of the Atlas Guaranty Company's note in the assets of the plaintiff. From its language, as well as the circumstances under which it was given, the note in suit was in effect the same as the other "stock notes." Assessments were made on this note as follows: July 30, 1892, ninety dollars, payable September 15, 1892; December 26, 1894, $100, payable February 1, 1895; and March 1, 1895, $710, payable April 15, 1895. Notice was given of each assessment by publication in the Rutland Herald, a newspaper printed in Rutland, agreeably to the requirements of the charter. The writ is dated September 6, 1895.

(1) The defendant insists that this action is barred by the statute of limitations, on the ground, as he claims, that the note in suit in legal effect is a note payable on demand, and that the statute began to run thereon from its date, although no demand was in fact made within six years from its date. Undoubtedly in the case of a note payable on demand, the contention of the defendant is correct. But when delay in making demand is expressly contemplated, there is no rule of law that requires that demand should be made within the statutory period for bringing an action. Where a promissory note made payable "three months after demand" was sought to be enforced more than twenty years after its date, it was held that as no demand had been made until within six years next before bringing the action, the statute had not run thereon. Wood on Lim. Actions 256, 257, *Stanton* v. *Stanton* 37 Vt. 413.

In *Stanton* v. *Stanton*, *supra*, it is said that "when the instrument itself indicates that the calls for payments were to be indefinitely prospective, and to be made as might suit the wants and convenience of the payee, there is no ground furnished upon which the law can assume any fixed point, as a limit to reasonable time for making a demand, and

therefrom give operation to the statute of limitations." The note in suit refers to the charter to determine when the installments called for by the directors should become due and payable. Section 6 of the charter, among other things, provided that "securities," which included "stock notes" should be payable in such installments and at such time or times as the directors might require, notice thereof being published in some newspaper printed in Rutland, at least thirty days previous to the time when such installment was declared to be payable. By the express terms of the defendant's note, no installment nor part thereof, was to be due until a time *after demand* should be made by such publication. These "stock notes" were treated as a fund for the benefit of the creditors of the plaintiff. It is apparent from the terms of the note, that delay in making demand, was expressly contemplated by the parties, and that the calls for payments were to be indefinitely prospective, and were to be made as might suit the wants and convenience of the plaintiff as the same should thereafter be determined by its business needs, and consequently the statute of limitations would not begin to run upon the installments, until the time fixed for payment by the call of the directors and the publication of notice agreeably to the charter. This contention of the defendant, therefore, cannot prevail, as this action was brought within six years of the time when the first installment became payable. This holding is not opposed to *Lycoming Fire Insurance Company* v. *Batcheller*, 62 Vt. 148, which recognizes the doctrine that the statute of limitations begins to run when the plaintiff first can sue on the claim in question.

The defendant also contends that, if the statute did not begin to run from the date of the note, it began to run at the expiration of a reasonable time in which to call for payment and to publish notice of such call pursuant to the terms of the note, and that such reasonable time had elapsed more than six years before the commencement of

this suit. If it were the law that the demand must have been made within a reasonable time, (which we do not decide,) to render this claim effective in his behalf, it would be incumbent on the defendant to show, as a matter of fact when such reasonable time expired, or to show a state of facts upon which the law would assume a limit to such reasonable time. *Stanton* v. *Stanton*, 37 Vt. 413. The record does not show such a finding as a matter of fact, by the trier, nor does it disclose such facts as enable this court to say as a matter of law, when such reasonable time would expire. Hence, on this view of the matter, it cannot be held that the note is barred by the statute of limitations.

(2) It is not necessary to decide whether it was error to admit parol evidence to show what occurred between Redington and the defendant, when the latter gave the note to the plaintiff, for the facts found on such evidence cannot avail the defendant by way of defense to this action. Such facts show that he gave the note for the purpose of enabling the plaintiff to deceive the Insurance Commissioners of this State in respect to its then financial condition, and he is estopped from taking advantage of his own fraud in this behalf. *Grand Isle* v. *Kinney*, 70 Vt. 381.

(3) The call by the directors for the several installments was not invalid by reason of the failure of the plaintiff to elect fifteen directors for the years in which such calls were made. The charter provided that there should be not less than seven, nor more than fifteen, directors. At no time did it elect less than seven directors, and at all times in question it had more than seven, and more than a majority of fifteen directors participated in the vote of the board declaring the installments payable. *Wright* v. *Com.*, 109 Pa. St. 560.

Judgment affirmed.

STATE *vs.* JOHN LAFORREST.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed May 6, 1899.

Sodomy—Adoption of Common Law—V. S. 898.—Sodomy was a crime at common law and is consequently a crime under the laws of this State by virtue of V. S. 898 adopting the common law so far as applicable to our situation and not repugnant to our laws.

Form of Punishment where None Prescribed—V. S. 5170.—No penalty for sodomy being prescribed by statute, the punishment is fine or imprisonment, or both, in the discretion of the court; but imprisonment if imposed must, by reason of V. S. 5170, be in the house of correction.

INDICTMENT FOR SODOMY. Trial by jury at the September term, 1898, Washington county, *Start*, J., presiding. At the close of the evidence, the respondent moved for a verdict of acquittal for that the evidence disclosed the commission of no crime under the laws of this State. The motion was denied. Verdict, guilty. Exceptions by respondent. Sentence respited.

Frank Plumley and *E. D. Edgerton* for the respondent.

There is no recognition of this act in our statutes. "The penal codes show a discreet silence upon this crime, doubtless imitating Solon, who in his legislation did not prescribe a penalty against parricide, a crime which he supposed impossible." Witthaus and Becker Med. Juris., vol. 2, p. 500.

Our adoption of the common law did not embrace parliamentary legislation. *LeBarron* v. *LeBarron*, 35 Vt. 365. Adultery was not a crime at common law. *State* v. *Cooper*, 16 Vt. 551. In 1787, sodomy was not a common law offense. *Coburn* v. *Harwood*, 1 Minor (Ala.) 93.

Cooley, Const. Law, 7 and 8; Rapalje & Lawrence, Dict.; Wharton's Law Dict.; 6 Peters, 110, 111. Vermont was

never an English colony and so was not under the common law. *Re Lamphere*, 61 Mich. 105. The text writers who treat it as a common law crime are not supported by the cases. *Com.* v. *Thomas*, 1 Va. cases 307; *Davis* v. *State*, 3 Har. & J. (Md.) 154.

Richard A. Hoar, State's Attorney, for the State.

THOMPSON, J. The only question raised in this case is whether sodomy is a criminal offense in this State. There is no statute on the subject, and unless it is an offense by the common law of England, the conviction cannot be sustained. If it is an offense at common law, such provision of that law is applicable to our local situation and circumstances and not repugnant to our constitution or laws, in so far as it makes sodomy a criminal offense, and is, therefore, the law of this State. V. S. 898.

In 1 Hawkin's Pleas of the Crown (6th ed.) 99, it is said that sodomy was felony by the ancient common law. In 12 Coke 36 and 37, speaking of this offense, it is said: "It appears by the ancient authorities of law that this was felony, but they vary in the punishment." See 3 Coke's Inst. 58; and note a, 1 Russ. Crimes (8th Am. ed. with Greaves's, Davis & Metcalf's and Sherwood's notes) 697. 25 Hen. VIII., c. 6, which made this crime a capital offense, clearly recognized that it was then a criminal offense by declaring in the preamble to that statute that "there is not yet sufficient and condign punishment appointed and limited by the due course of the laws of this realm for the detestable and abominable vice of buggery committed with mankind or beast, etc." Bishop says the effect of this statute was merely to settle the question that this offense is a felony punishable in the same way as other felonies. Bish. Cr. Pr. § 966. Bishop further says it was an offense at common law, and consequently is an offense in those states adopting the common law. 1 Bish. Cr. Law (7th ed.) § 503; (4th ed.) § 948. To the same effect are *State* v. *Place*, 5 Wash. 774 (1893); and *State* v. *Frank*, 103 Mo. 122. We think it

clear that it was a crime at common law, and, therefore, is a criminal offense in this State. There being no punishment prescribed by statute, the punishment is fine or imprisonment, or both, in the discretion of the court; but imprisonment, if imposed, must be in the house of correction. V. S. 5170.

Judgment of guilty on verdict. Let sentence be pronounced and execution thereof done.

ANDREW GREGG *vs.* MASA WILLIS.

October Term, 1898.

Present: ROSS, C. J., ROWELL, MUNSON and THOMPSON, JJ.

Motion for reargument made and heard January Term, 1899, overruled.

Opinion filed May 6, 1899.

Statement.—This was an action upon a note given by the defendant to the plaintiff in consideration of one thousand dollars loaned. The defense was that the money was reloaned by the defendant to a firm consisting of the defendant's son and another, into which firm the plaintiff was soon after admitted as a partner under an arrangement between all concerned by which the note was extinguished, as well as the firm's debt to the defendant, and that certain collateral security for the note was surrendered at that time, although the note itself was retained by the plaintiff contrary to his promise that it should be destroyed; that the plaintiff after remaining in the firm about eight weeks sold his interest to his partners for one thousand dollars. *Held*,

Evidence.—That the plaintiff was not entitled on cross-examination of one of the partners to ask if at the close of the partnership it was not owing the defendant two thousand dollars; nor to ask when, if ever, the plaintiff left the partnership, as both matters were immaterial.

Evidence.—That even if the plaintiff never sold his interest, nor received anything when the partnership property was sold, nor ever, such facts had no tendency to disprove the defendant's claim that the note had been extinguished.

Evidence.—That as there was no evidence tending to show that the

plaintiff, if he did make the arrangement claimed by the defendant, ever rescinded the contract, the defendant was not affected by anything that may have occurred between the plaintiff and his partners in the nature of a fraud upon the plaintiff.

Evidence.—Even if the defendant knew that the company was insolvent when the plaintiff became a partner, that fact had no tendency to prove that the plaintiff's partners were the defendant's agents in inducing the plaintiff to enter the firm.

Evidence.—The fact that no note was given the defendant by the company and that the loan did not appear upon its books, had no tendency by itself to prove that the business of the company was the business of the defendant, and the record does not disclose that there was any other evidence which made it admissible as corroborative.

Evidence.—Neither would the fact that the firm, after the plaintiff's withdrawal, compromised with its creditors with the financial assistance of the defendant, tend to prove that the business of the company belonged to the defendant before the plaintiff became a member.

Evidence.—To make the exclusion of evidence error, it must appear affirmatively that at the time of its exclusion the record already disclosed facts which made the evidence admissible, or that an offer was then made to show such facts.

Offer Necessary.—Certain exceptions to the exclusion of questions are overruled because there was no offer to show any relevant fact.

Contradicting Witness.—A witness is not to be contradicted upon collateral matter drawn out by the party seeking to contradict.

Right to Contradict.—A statement by a witness that it seems to him that he did or said a certain thing but that he is not sure, is equivalent to a statement that he does not know, and is too indefinite to entitle the opposite party to disprove it.

V. S. 1237—One Party Insane.—The issue on trial was whether the note had been extinguished. The defendant being insane within the meaning of V. S. 1237, the plaintiff was incompetent as a witness in respect to what occurred between himself and the defendant relative to that issue, but not in respect to collateral matter, such as what occurred between the plaintiff and his partners by way of purchasing an interest in the firm and leading up to the alleged agreement for extinguishment; but the court properly excluded his offer, which was made in terms so broad as to cover both matters.

Statute of Frauds.—The contract, being executed, was not within the statute of frauds.

Exception Construed.—A general exception to the charge, or to a portion of the charge, is to be understood as an exception to the statement of the law and not to statements of the evidence or its tendency. When it is claimed that these are misstated or misconceived it is the duty of counsel to specify, in order that they may be corrected at the time.

Charge.—It was not error to instruct the jury that if they found that the collateral was surrendered as claimed by the defendant, it was

significant as showing that some transaction took place, although it did not indicate its terms.

GENERAL ASSUMPSIT. Pleas, general issue, accord and satisfaction and payment. Notice in reply to payment. Trial by jury at the March term, 1898, Windham county, *Taft*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

Clarke C. Fitts, Haskins & Schwenk and *L. M. Read* for the plaintiff.

Waterman, Martin & Hitt for the defendant.

THOMPSON, J. The plaintiff claimed to recover of the defendant the amount of a note for $1000, executed and delivered to him by the defendant. No question was made as to the execution of the note, and it was conceded that the consideration therefor was $1000, delivered to the defendant by the plaintiff at or about the time of its execution. The defendant's evidence tended to show, that at the time in question, his son, H. B. Willis, and E. J. Carey were partners in business at Brattleboro, Vt., under the firm name of the Thorne Medicine Co.; that June 19, 1890, he loaned them the $1000, borrowed of the plaintiff; that thereafter in the summer of 1890, the plaintiff purchased a one-third interest in the business of the company and agreed to pay therefor $1300; and that it was then mutually agreed by the plaintiff, the defendant Carey, and H. B. Willis, that $1000 of said $1300 should be paid the defendant by surrendering to him the note in suit and certain collateral security pledged with the note, then held by the plaintiff, and that this should pay the $1000 loaned the firm; that thereupon the plaintiff surrendered the collateral security to the defendant but said his wife had the note and he wished to conceal from her the fact that he had purchased an interest in the company and that he could not get the note that day but would thereafter procure it and surrender it to the defendant or destroy it. The plaintiff

never surrendered nor destroyed the note, but produced it on trial. If the arrangement was as claimed by the defendant, it then and there operated to extinguish the debt of $1000, then owing from the Thorne Medicine Co. to the defendant, and the note in suit owing from the defendant to the plaintiff.

The defendant's evidence tended to show that plaintiff remained a member of the firm about eight weeks and then sold out his interest therein to his partners for $1000, taking their note therefor. Some months after the summer of 1890, the company closed its business.

(1) On cross-examination of H. B. Willis, the plaintiff asked him if the firm at the time it closed its business, was not owing the defendant $2000. This question was excluded as immaterial, to which the plaintiff excepted. The plaintiff also excepted to the exclusion of his exhibit "B." Neither of these exceptions can be sustained for the reason that the record does not show that, in the then aspect of the case, the question or exhibit "B" was relevant to any issue on trial by reason of evidence already introduced, or by reason of an offer to show facts which would make the same relevant. To make the exclusion of evidence error, it must appear affirmatively that at the time of its exclusion, the record of the trial court disclosed such facts as would make such evidence admissible, or that in connection with the offer of it there was also an offer to show such facts as would render it admissible.

(2) On cross examination, the plaintiff also asked the same witness when the plaintiff left the Medicine Company, if he ever left it. This question was excluded. The exception to its exclusion cannot be sustained for the reason that the time when he left the company, if he ever left it, was immaterial so far as any issue on trial was concerned. While the question might have been permitted in the discretion of the trial court, it was not reversable error to exclude it.

(3) If it were true that the plaintiff never sold out any interest in the Medicine Co., and neither received nor was paid anything when its property was sold, and never received anything for his alleged interest in the firm, such facts would have no tendency to prove that the note in suit was not extinguished in the manner claimed by the defendant. Hence the offer of the plaintiff to show such facts, was properly excluded.

(4) If the plaintiff bought a third interest in the Thorne Medicine Co. under an arrangement by which the note was paid as claimed, there was no evidence tending to show that he ever rescinded the contract by which he became such partner. There is, therefore, no occasion to discuss the relative rights of the defendant and plaintiff, had the latter rescinded the contract by which he became a partner, because he was induced to enter into it by the fraudulent representations in respect to the business and property of the firm, made to him by his partners. There having been no recision, the defendant was not affected by anything that occurred between the plaintiff and his partner in that respect, unless the defendant was a party to the fraud. If such a fraud was perpetrated upon the plaintiff, there was no evidence tending to prove that the defendant participated in it. Therefore it was not error to exclude the offer to show that the plaintiff was induced to buy an interest in the firm by the fraudulent representations of his partners. Nor was it error to exclude the inquiry on cross-examination, made to H. B. Willis, as to whether at the time the plaintiff was investigating the affairs of the firm with a view of making the purchase, its books then shown him, did not disclose that the concern was then bankrupt. This last exception cannot prevail for the further reason that there was no offer to show any relevant fact by the witness in response to this inquiry.

(5) If the defendant knew that the company was insolvent at the time the plaintiff became a partner therein,

it had no tendency to prove that Carey and H. B. Willis, were the agents of the defendant in inducing the plaintiff to purchase an interest in the company. It was solely on the question of such agency, that the plaintiff offered to show such knowledge. The evidence offered tending to show such knowledge, was therefore properly excluded.

(6) In rebuttal, the plaintiff improved H. B. Willis as a witness and asked him several questions which were excluded, to which ruling the plaintiff excepted. These exceptions are not sustained for the reason that there was no offer to show any relevant fact by the witness in response to these questions. *Carpenter* v. *Willey* 65 Vt. 175; *Roach* v. *Caldbeck*, 64 Vt. 596.

(7) The fact that no note was given defendant for the $1000, by the company, and that it did not enter the loan upon its books, standing alone had no tendency to prove that the business of the company was in fact his, and the record does not disclose that there was any other evidence which would make it admissible as a corroborating circumstance or otherwise. Nor would the fact that sometime after the plaintiff left the firm, it undertook to compromise with its creditors, and that the defendant assisted therein and furnished the money to pay the creditors, have a tendency to prove that the business of the company belonged to the defendant prior to the time when the plaintiff became a member thereof. *Martyn* v. *Curtis*, 67 Vt. 264. Hence the plaintiff's exception to the exclusion of his offer to show such facts, cannot avail him.

(8) The entire testimony of the defendant taken *in perpetuam*, had no tendency to rebut the case made by the defendant, nor had the parts thereof specially offered by the plaintiff any tendency to prove the facts to establish which, they were offered by the plaintiff in rebuttal, and all this testimony was properly excluded.

(9) On cross-examination of Carey, the plaintiff elicited from him, the statement, in substance, that it seemed to him

that after plaintiff became a partner of the firm, he, the witness, represented to Fox, Fulz and Webster of Boston, one of their creditors, that plaintiff was a partner, that they notified some houses with whom they dealt of that fact, but just what houses he could not say. The parts of the Fulz deposition offered to show that Fox, Fulz and Webster were not so notified, were properly excluded. Whether they were so notified was a collateral matter drawn out by plaintiff, and could not be thus contradicted. Again there was not sufficient basis for an impeachment, were it to be held that this was a matter open to contradiction, for a fair construction of the testimony of the witness, makes him say he does not know whether this Boston creditor was notified by him or not.

(10) The issue on trial was whether the note in question had been paid or extinguished by the alleged arrangement before stated. It appeared that the defendant at the trial below was insane within the meaning of V. S. 1237, and consequently the plaintiff was rendered incompetent as a witness in respect to what occurred between him and the defendant relative to the issue on trial. What occurred between the plaintiff and H. B. Willis and Carey by way of purchasing an interest in the firm, and leading up to the alleged agreement with the defendant in respect to the extinguishment of the note, was a collateral matter upon which the plaintiff was a competent witness. *Morse, Exe.* v. *Low, Admx.* 44 Vt. 565. The plaintiff's offer was to show by himself, "fully about the alleged transaction which defendant claimed took place wherein plaintiff agreed to destroy the note in suit." This included what took place between plaintiff and defendant, as well as collateral matters between plaintiff and H. B. Willis and Carey. The offer being in part inadmissible, it was not error to exclude it in whole.

(11) There was no error in admitting the interrogatories in chief in Carey's deposition to which plaintiff excepted.

(12) The plaintiff was not entitled to a compliance with his fourth request to charge. The contract was not within the statute of frauds, if as claimed by the defendant, being an executed contract. *Howe* v. *Chesley*, 56 Vt. 731.

(14) The record not showing the contrary, it must be taken that the court below in that portion of its charge to which exception was taken by the plaintiff, correctly stated what the evidence tended to show in respect to the agreement by which it was claimed the note was extinguished. If this presumption were not to prevail, this exception being general, could not avail the plaintiff. If the plaintiff claimed that the trial court in its charge had misstated, or misconceived the tendency of the evidence, he should have called its attention to this ground of exception, and the mistake, if one had been made, would then and there have been corrected. This not having been done, that court had a right to understand that the exception was to the statement of the law, and not in respect to a statement of facts. There was no error in the statement of the law applicable to the case.

(15) It was not error for the court to instruct the jury that if they found that the collateral security was surrendered as claimed by the defendant, it was significant as showing that some transaction took place at that time, but did not indicate its terms. Nor was this statement even argumentative, as claimed by plaintiff's counsel.

Judgment affirmed.

CLARA A. LOCKLIN *vs.* O. O. DAVIS.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed May 3, 1899.

Estoppel.—If one by words, conduct, or culpable silence, although without intent to defraud, leads another, who acts prudently, to believe that a certain state of things exists, and who acts upon such belief accordingly, he is estopped to deny the existence of such a state of things, if the other party would be prejudiced thereby.

Estoppel—Married Woman.—The doctrine of estoppel applies to the plaintiff, though a married woman, for she was *sui juris* by statute in respect of the matters involved.

TRESPASS AND TROVER. Pleas, the general issue and justification as an officer under regular process. Upon referee's report, at the September term, 1898, Washington county, *Start*, J., presiding, a *pro-forma* judgment was rendered for the plaintiff. The defendant excepted.

This is an action to recover damages of the defendant who as a deputy sheriff attached the property in dispute on a writ in which the plaintiff's husband was defendant. Upon trial no question was made as to the regularity of process or authority of the defendant as officer. The question litigated was the right of the defendant to hold the goods in question on an attachment against the plaintiff's husband, the plaintiff claiming to own them.

Frank Plumley for the defendant.

John G. Wing for the plaintiff.

ROWELL J. If one by words, conduct, or culpable silence, although without intent to defraud, leads another, who acts prudently, to believe that a certain state of things exists, and who acts upon such belief accordingly, he is

estopped to deny the existence of such a state of things, if the other party would be prejudiced thereby; for such denial would be a breach of good faith, and therefore fraudulent. *Strong* v. *Ellsworth*, 26 Vt. 366; *Cady* v. *Owen*, 34 Vt. 598, 603; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 108; *Continental Bank* v. *Bank of the Commonwealth*, 50 N. Y. 575, 583.

In the case at bar the plaintiff's husband entered into the management of the business of the store with the intention of gaining a livelihood therefrom for himself and wife. He acted in all respects as the owner and proprietor, buying, selling, and managing the business in his own name, with the knowledge and consent of the plaintiff. There was nothing to indicate to those dealing with him that he was not what he appeared to be—the owner and proprietor, and those who sold him goods regarded him as such and treated him accordingly. The plaintiff read all the correspondence connected with the business, and had full knowledge of the way he was conducting it, and knew that the creditors looked upon him as the proprietor, and were extending credit to him as such; but she did nothing to inform them of her claimed ownership nor that they were mistaken as to the person who was conducting the business. She knew that her husband bought in his own name the goods of Smith, plaintiff in the writ on which the attachment was made, and that Smith's salesman understood that her husband owned the business, and gave him credit on the faith of that understanding. She knew that the funds derived from the sales were used by her husband for business purposes and family expenses; and although she knew that Smith was extending credit to her husband on the belief that he was the proprietor, she neither said nor did anything to indicate to him nor to his salesman that she owned the business or had any interest therein.

In these circumstances her silence was culpable, as it was well calculated to mislead, and did mislead, both Smith and

his salesman to believe that her husband was the owner of the goods and to give him credit on the strength of such belief. They cannot be said to have been negligent in the matter, and she must be taken to have intended the natural consequence of her silence. Therefore she is estopped from claiming the goods as her own, for that would be a breach of good faith on her part and therefore fraudulent. *Flint* v. *Babbitt*, 59 Vt. 190. *Sanborn & Catlin* v. *Chittenden*, 27 Vt. 171, 176.

There is no doubt that the doctrine of estoppel applies to the plaintiff, though a married woman, for she was *sui juris* by statute in respect of the goods at the time in question.

Judgment reversed, and judgment for the defendant to recover his costs.

STATE *vs.* S. W. ALLEN et al.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed May 11, 1899.

Listers.—V. S. 2992, which provides that if a lister after accepting the office does not perform its duties, he shall be fined one hundred dollars, applies to a failure to take up or carry on the general duties of the office, and not to single instances of failure to perform the whole duty of lister, such as the omission to file the tax inventories with the town clerk for preservation, as required by V. S. 440.

INDICTMENT. Demurrer. At the September term, 1898, Essex county, *Taft*, J., presiding, a *pro-forma* judgment was rendered overruling the demurrer and holding the indictment sufficient. The respondent excepted.

H. W. Lund, State's Attorney, for the State.

George N. Dale and *Bates, May & Simonds* for the respondents.

START, J. It is charged by the indictment that the respondents, as listers of the town of Maidstone, neglected and refused to lodge the inventories of the several tax-payers of the town of Maidstone in the town clerk's office, on or before June 1, 1896.

This neglect and refusal is not an offense against the criminal law, unless it is made so by V. S. 2992, which provides, that, if a lister, after accepting the office, does not perform its duties, he shall be fined not more than one hundred dollars. V. S. 440, provides that the inventories filled out by the tax-payers and taken up by the listers shall, on or before the first day of June in the year in which they are taken up, be lodged in the office of the town clerk, where they shall be preserved for a period of three years from such first day of June, and, after the expiration of such period, they may be destroyed by the clerk. It will be noticed that this section does not provide that it shall be the duty of the listers, or any of them, to thus lodge the inventories in the office of the town clerk. But, assuming that it was intended that this duty should be performed by the board of listers, or that each lister should lodge in the town clerk's office the inventories taken up by him, we think an offense against § 2992 is not alleged. It was not intended that a lister who entered upon and continued in the performance of the duties of the office should be subjected to a fine of one hundred dollars, if, in a single instance, he failed to perform his whole duty; nor was it intended that he should forfeit a like sum for every shortage of duty. If a lister, accepting the office, does nothing more, or if, after accepting the office and entering upon the performance of its duties, he stops and does not continue in the performance of its duties, he subjects himself to the penalty provided for in this section,

and not otherwise. It is not alleged in the indictment that the respondents, after accepting the office, did not enter upon and continue in the performance of its duties; and, for want of such allegation, it must be held insufficient.

Exceptions sustained; indictment adjudged insufficient and quashed; respondents discharged.

WILLIAM D. SHERMAN *vs.* THE DELAWARE & HUDSON CANAL COMPANY.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed May 6, 1899.

Fellow Servant—Question of Fact.—The plaintiff, while repairing one of the defendant's cars, was injured by the negligent starting of the train, and the question was whether he was a servant of the defendant and so a fellow-servant of the engineer, or the servant of another railroad company which had charge of the repairing for the defendant. Under the circumstances, which are too voluminous to be stated here, the question was held to have been properly submitted to the jury as one of fact.

Contributory Negligence.—The question of contributory negligence was also properly treated as one of fact.

Sufficiency of Evidence—Exception.—As to the sufficiency of evidence upon a given point, parties are bound in this court by the position they have taken in the court below.

Notice.—If the engineer was absent, and the fireman was in control of the engine and the one to start it, notice to him of the plaintiff's position was sufficient notice to the defendant, and the court cannot say that notice should have been given to the conductor.

Evidence.—It was competent to inquire of the engineer, who was improved as a witness by the defendant, as to what were the duties of the fireman in respect to calling his attention to the fact that a person was engaged in his duties about the train who would be in danger from the starting of the engine.

CASE. Trial by jury, at the March term, 1898, Rutland county, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff sought to recover damages for injuries sustained by reason of falling from a ladder upon which he was standing while taking measurements of a ventilator upon a passenger car of the train. His fall was occasioned by the starting of an engine attached to said car.

Butler & Moloney, for the defendant, cited, 3 Woods, Railroad Law, 338, 1768; *Swainson* v. *North Eastern R. Co.*, L. R. 3 Exch. Div. 341; *Latremouille* v. *B. & R. R. Co.*, 63 Vt. 345; *Magoon* v. *B. & M. R. Co.*, 67 Vt. 177; *Boss* v. *N. P. R. R.*, 33 Am. St. 756; *Church* v. *Chicago, M. & St. P. R. Co.*, 52 N. W. 647; *Ruppert* v. *Brooklyn Heights R. Co.*, 154 N. Y. 90; *People* v. *Kennedy*, 32 N. Y. 141; *Searles* v. *Manhattan R. Co.*, 101 N. Y. 661; *Bohan* v. *Milwaukee, etc., R. Co.*, 61 Wis. 391.

G. E. Lawrence and *J. C. Baker* for the plaintiff.

THOMPSON, J. The plaintiff's evidence tended to prove that the Rutland Railroad was under a contract with defendant to inspect its passenger cars arriving at the Union depot in Rutland, and to make such needed repairs thereon as the defendant chose to have made there instead of making them itself at its shops in Salem, N. Y., or some other place in New York; that as a rule the defendant furnished the materials for such repairs as were made by the Rutland Railroad, but sometimes the latter furnished them; that at the time of plaintiff's injury, he was in the employ of the Rutland Railroad as a car inspector, and that it was his duty to examine the inside and outside, except the trucks, of all cars, including the defendant's, coming into this depot, and if any repairs were needed to report them to Henry Adams, the foreman of the car shops of the Rutland Railroad; that if the repairs were such as would not pay to take the car to the repair shops, like repairing broken glass,

ventilators and similar small jobs, he made the repairs himself; but that all that he did as well as his time, was reported to Adams, and for his services, he was paid by the Rutland Railroad, which rendered a monthly bill for the services of its employees and for material used, to the defendant, which paid it monthly for the same; that whenever need of repairs was called to his attention by the servants of the defendant, or the Rutland Railroad, or by a stranger, or by his own observation, it was plaintiff's duty to inspect at once, and attend to such repairs as were made by him; that when in need of materials for repairs, he at times called on Pierce, the foreman of the defendant at Rutland, for the same; that the plaintiff received his orders, in respect to inspecting and making repairs, from Adams; that on one or two occasions the plaintiff had informed Pierce of some little jobs of repairs which defendant wanted done at Green Island when the car reached there; that on the evening of the day before the accident, the plaintiff was informed by Shippey, another car inspector of the Rutland Railroad, doing the same kind of work as the plaintiff, that a ventilator in connection with the stove pipe in one of defendant's passenger cars, was broken off, and that Shippey requested him to measure it and have one put on; that on the following morning, about a quarter past six, plaintiff went through the depot, past the engine attached to the car in question, and that there was then no one on the engine; that he then went into the car and learned what was wanting; that he then went out and looked at the top of the car, then went around the car, and there saw the fireman of the engine and told him not to start for a few minutes, as he (plaintiff) had got to go up on top of the car; that plaintiff then ran to the car-house about one hundred and fifty feet away, got a ladder and went back to the engine, and requested the fireman not to start the train until he (plaintiff) went up and fixed the car; that in response to this, the fireman said, "What?" and that plaintiff replied

"Don't start, because I have got to go up and measure the car; I have got to go up and measure the ventilator"; that thereupon plaintiff placed the ladder against the outside of the car, and went up on it to where the ventilator was located between the upper and lower decks of the top of the car, and while he was measuring the ventilator, the train was started by the engineer and the plaintiff was thrown down and received injuries for which this suit is brought to recover damages. Plaintiff's evidence tended to prove that the engineer was not in or about the engine when plaintiff went for the ladder and when he returned to the car and spoke to the fireman requesting him not to start the train, and that the fireman was the only person then in the engine; that this train was not run on the day of the accident by the regular conductor; that the person who was conductor was in the car when the plaintiff went into it before getting the ladder, but that he did not then know he was the conductor; that this train was known as the Salem freight and left Rutland about half past six o'clock in the morning and returned there at about the same hour in the evening of the same day; that at the time of the accident there was only the passenger car attached to the engine, and that the plaintiff's usual working hours were from seven o'clock in the morning until six o'clock in the evening.

The defendant claimed that at the time of the accident, the plaintiff was acting as its servant, and that his injury resulted from the act or negligence of a fellow servant, and that consequently he could not recover, and at the close of the evidence moved the court to direct a verdict for it on this ground. It now contends that it was error for the court below to submit to the jury the question whether the plaintiff at the time of the accident was in its employ, or was then acting as the servant of the Rutland Railroad. Some of the evidence introduced by the defendant tended to show that plaintiff was then its servant, and some of its

testimony tended to show that he was then in the employ and service of the Rutland Railroad in performing its duty as contractor to inspect and repair the cars of the defendant. The plaintiff's testimony also tended to prove that he was not the servant of defendant, but was the servant of the Rutland Railroad and engaged in performing its service when the accident occurred. There being a conflict in the testimony on this point, the court below was right in submitting the question to the jury. Under proper instructions, the jury found that plaintiff was not then the servant of the defendant, and that he then was the servant of the Rutland Railroad. Being under the control and direction of the latter as his master and performing its service as contractor, the plaintiff was not a fellow servant of defendant's servants who were operating the train in question, and consequently the doctrine of fellow servant does not apply. 1 Shearm. & Red. Neg., § 225; 3 Wood Rail. (1st ed.) § 388; *Goodfellow* v. *Boston, H. & E. R. R.*, 106 Mass. 461; *Sawyer* v. *Rutland & Burlington R.*, 27 Vt. 370; Shearm. & Red. Neg. (2nd ed.) § 101; *Louisville, New Orleans and Texas R. Co.* v. *Conroy*, 63 Miss. 562: 56 Am. Rep. 835.

The defendant also contends that it was error for the court below not to hold, as requested, that as a matter of law it was contributory negligence for the plaintiff to go up on to the car as he did, instead of having it run down by defendant's yard where repairs were usually made. It was clearly a question of fact for the jury to determine whether the plaintiff exercised the care and prudence of a prudent man under like circumstances, in view of the purpose for which he mounted the ladder and went on to the side of the car, the proximity of other trains about to start, and the notice he gave the fireman who was apparently in charge of the engine. In view of all the circumstances of the case, it could not be said as a matter of law that it was contributory negligence for plaintiff to do as he did. Hence

this contention of the defendant is not sustained. These are the only grounds upon which the court below was asked to direct a verdict.

The charge of the court on the subject of contributory negligence as applied to this case was correct.

The defendant excepted to the charge of the court that if the engineer was away from the engine, the fireman was the proper person for him to notify that he was going up on to the car, provided the fireman was in charge of the engine and then had control of it to start it. The ground of this exception stated at the trial below, was that the conductor was the person to whom the notice should have been given. Although the defendant has argued this exception in this court on the ground that there was no evidence tending to prove that the engineer was away from the engine, as well as on the ground of exception taken below, he is confined in this court to the position then taken, as the court below was not called upon to pass on the question of the sufficiency of evidence, now attempted to be raised. However, the record shows there was evidence tending to prove that the engineer was away. If the fireman was in control of the engine and the one to start it, notice to him would be sufficient to make defendant liable for injury to plaintiff by the careless starting of the train after such notice, without giving him notice of the purpose to start it, and an opportunity to escape from the perilous position in which he would be, if the train were to start.

It was competent to inquire of the engineer, who was improved as a witness by the defendant, as to what were the duties of the fireman in respect to calling his attention to the fact that a person was engaged in his duties about the train, if he would be in danger from the starting of the engine.

Judgment affirmed.

STATE *vs.* ARTHUR J. SMITH.

January Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed May 11, 1899.

State's Duty to Produce Witnesses.—While it is held in some cases that it is the duty of the State in criminal trials to produce all witnesses within reach of process whose testimony will shed light upon the transaction, its failure to do so does not justify an inference unfavorable to the State when the witnesses are equally available to both parties.

Exception—Charge.—This court cannot find error in the charge of the county court to the effect that the defendant's failure to produce certain witnesses might be weighed against him, for the evidence, which is not referred to, may have shown that the witnesses were peculiarly within the knowledge and reach of the respondent, and the remainder of the charge, which is not referred to, must be assumed to have given the proper instructions.

INFORMATION for keeping a nuisance in the city of Barre. Plea, not guilty. Trial by jury, at the March term, 1897, Washington county, *Taft*, J., presiding. Verdict and judgment of guilty. The respondent excepted.

There was testimony in the case tending to show that a warrant was issued, and the premises searched for intoxicating liquors, and that liquors were found in the premises, and that at the time of the seizure the respondent with several others, some of whom were named by and others were unknown to the witnesses, were present in the premises.

The owner of the building or the one having control of the same was not summoned, nor was any proof offered by the State to show who was the lessee or in control. Counsel for the respondent claimed the right to argue to the jury that it was the duty of the State to summon all witnesses, especially those whose testimony could

establish the fact as to who was the lessee and had control of the premises, and that the failure of the State to produce such testimony was to be weighed against it. The court ruled that no presumption was to be drawn against the State because it did not bring witnesses when such witnesses were equally within the reach of both parties.

Lord & Carleton for the respondent.

Fred A. Howland, State's Attorney, for the State.

START, J. In passing upon the questions reserved in the court below, it becomes necessary to consider when and under what circumstances an inference unfavorable to a party may be drawn from his failure to produce other witnesses. It may be stated as a general rule, that, when it appears that evidence is *peculiarly* within the knowledge and reach of one party and not the other, an inference unfavorable to the party having such knowledge and to whom the evidence is peculiarly available may be drawn from his failure to produce such evidence. Applying this rule to the facts shown by the exceptions, it is clear that an inference unfavorable to the State could not be drawn from its failure to produce as a witness the owner of the building in which the liquor was found, nor from its failure to produce as witnesses other persons who were in the building. We cannot assume that the knowledge of these persons was peculiarly the knowledge of the prosecution, nor that they were peculiarly within its reach; and, in the absence of any showing upon this subject, the ruling of the trial court, that no presumption was to be drawn against the State because it did not produce witnesses, when such witnesses were equally within the reach of both parties, is presumed to have been justified by the evidence. While it is held in some cases that it is the duty of the State in criminal trials to produce all witnesses within reach of process, whose testimony will shed light upon the transaction, its failure to do so does not justify an inference unfavorable to the

State, when the witnesses are equally available to both parties. *State* v. *Fitzgerald*, 68 Vt. 125; *State* v. *Harrison*, 66 Vt. 523; *State* v. *Slack and Clough*, 69 Vt. 486; *State* v. *Roberts*, 63 Vt. 139; *Arbuckle* v. *Templeton*, 65 Vt. 205; *Scovill* v. *Baldwin*, 27 Conn. 318.

The court, after instructing the jury that they were not to draw any presumption against the respondent because he did not go upon the stand and testify, in effect said: "The testimony tends to show, that he was pretty constantly there, in the room, and that there were others with him at these times; and, if you believe that he could have shown by these witnesses, that he was not the keeper of the room, and some one else was, you have the right to consider the fact that he did not call these witnesses for the purpose of showing who the keeper of the room actually was." The respondent excepted to what the court said about the tendency of the evidence and calling other witnesses. The testimony is not referred to, and we cannot say that the evidence did not have the tendency stated by the court; nor can we assume that the evidence did not tend to show that the evidence referred to by the court was peculiarly within the knowledge and reach of the respondent. If such was the tendency of the evidence, the charge as given, in so far as it appears in the exceptions, was correct. The charge is not referred to, and it does not appear that the respondent excepted to the failure of the court to further instruct the jury. In order for this court to hold that there was error, we must assume, without the charge or evidence before us, that the court did not further instruct the jury as to the law applicable to the case, or that the evidence did not tend to show that the evidence referred to by the court below was peculiarly within the knowledge of the respondent. This, for the purpose of finding error, the court will not do. *Brooks* v. *Guyer*, 67 Vt. 669; *Bragg* v. *Laraway*, 65 Vt. 673; *State* v. *Bradley*, 64 Vt. 466.

In *State* v. *Fitzgerald*, 68 Vt. 125, relied upon by the

respondent, the court recognized the rule, that, when evidence peculiarly within the knowledge of a party is not produced, an inference unfavorable to such party may be drawn from his failure to produce it; but it appeared in that case that the evidence was equally available to both parties. For this reason, it was held that no inference unfavorable to the respondent could be drawn from his failure to produce it. In *State* v. *Ward*, 61 Vt. 191, it is said: "If the jury were satisfied that on the night of the fire and of the attempt to set it, the respondent was in some place other than the *locus criminis* and could have called witnesses to prove it, his failure to do so was a proper matter of comment by council and consideration by the jury." In *Seward* v. *Garlin*, 33 Vt. 592, it is said: "A failure to produce proof, when in the power of a party, is recognized even in criminal cases as proper to be considered by the jury." In *Beattie* v. *Grand Trunk R. R. Co.*, 41 Vt. 275, it was held that the failure of the defendant to produce its section man, who had examined its track before and after the accident and was then four miles from the place of trial and in the defendant's employ, was a proper subject of inquiry and argument. In *Graves* v. *United States*, 150 U. S. 118: L. ed. 37, 1023, it is said: "The rule, even in criminal cases, is, that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." In *Commonwealth* v. *Brownell*, 145 Mass. 319, the respondent was complained of for keeping a nuisance. The charge upon the subject of non-production of witnesses by the respondent, so far as it is reported, appears to have been substantially the same as the charge in the case at bar; and it was held that the respondent had no ground of exception.

Judgment that there is no error, and that the respondent take nothing by his exceptions.

WOOLSON BROTHERS *vs.* D. L. FULLER & SON.

January Term, 1899.

Present: TAFT, C. J., ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed May 11, 1899.

Partnership.—One who makes, delivers and bills goods to one member of a firm, knowing that they are for that member's personal use, is not entitled to a money judgment therefor against the firm, although there may be an understanding between him and such member, unknown to the copartnership, that the goods shall apply in payment of the firm's account against the seller. Whether the right of offset would exist under such an arrangement is not decided.

GENERAL ASSUMPSIT. Trial by court, at the September term, 1897, Washington county, *Tyler*, J., presiding. Judgment for the plaintiffs. The defendants excepted.

T. R. Gordon and *Lord & Carleton* for the defendants.

Senter & Goddard for the plaintiffs.

START, J. It is found, among other things, that the plaintiff, S. C. Woolson, was for many years engaged in business as a merchant tailor, under the name of Woolson Bros., and the defendants in the hardware business, under the firm name of D. L. Fuller & Son, the firm consisting of D. L. Fuller and his son, Charles H. Fuller; that, prior to July 13, 1886, Charles had bought clothing for himself of the plaintiff, and the balance of account against him was $244.93; and that, on said day, the plaintiff charged this balance to D. L. Fuller & Son, and thereafter furnished clothing to Charles for his personal use, made and rendered bills for the same to Charles personally, and charged them upon his books to D. L. Fuller & Son. The plaintiff's reason for making these charges to the firm was, that he was buying goods to a considerable amount at the firm's

store, and he understood that he was paying for the goods so purchased by him by the clothing he was furnishing to Charles. Charles did not direct the plaintiff to charge his bills to the firm, nor did he and the plaintiff ever agree that one account should pay the other, but both understood that the goods purchased by the plaintiff of the firm would be paid for by the clothing furnished to Charles. D. L. Fuller did not know that the plaintiff understood that the firm's bill against him was to be paid by clothing furnished to Charles, nor did he know that the plaintiff made his charges to the firm, nor that he claimed to have any charges against the firm, until this suit was brought.

It is unnecessary to, and we do not, decide whether or not effect can be given to the understanding of the plaintiff and Charles, that clothing furnished to Charles by the plaintiff should apply in payment of the firm's account against the plaintiff. The suit is brought by the plaintiff against the firm to recover for the clothing furnished by the plaintiff to Charles for his use and charged to the firm, less the payments made thereon by Charles; and, if a recovery can be had, it must be upon the ground that the firm is, under the circumstances shown by the findings, legally chargeable therefor. Charles could not, and did not, pledge the credit of the firm for his personal apparel. If his and the plaintiff's understanding has any effect upon the firm, it only has the effect to apply the clothing in payment of the firm's account against the plaintiff. It does not give a right of action against the firm. When the plaintiff made, delivered and billed the clothes to Charles, he knew that they were for Charles's personal use; and he could not bind the firm so as to entitle him to a money judgment against it, by an understanding with Charles, which was not known to the other co-partner, that they should apply in payment of the firm's account. The other co-partner knew nothing about the understanding of the plaintiff and Charles, and never consented that the firm should be holden for Charles's

personal apparel. Under these circumstances, the credit of the firm was not pledged so as to entitle the plaintiff to maintain an action against the firm. *Hubbard* v. *Moore*, 67 Vt. 532; *Jenney* v. *Springer & Willard*, 78 Iowa 617: 16 Am. St. Rep. 460.

Judgment reversed, and judgment for the defendants to recover their costs.

BENJAMIN DOW *vs.* C. E. TAYLOR, MONTPELIER & WELLS RIVER RAILROAD, tr., and R. E. HENDERSON, clt.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed May 31, 1899.

Trustee Process—Validity of Assignment—V. S. 4965, 4966.—The defendant gave the claimant an order on the trustee for the defendant's wages due and to become due, in consideration of an old debt of twelve dollars, and the further loan of twenty dollars, and "for the purpose, among other things, of preventing other creditors trusteeing, and to enable the claimant to take out of the monthly pay such sum as the debtor might see fit to let him take." *Held*, that to the extent of the indebtedness the contract was on a legal consideration, but, beyond that, was in contravention of the statute against fraudulent conveyances—V. S. 4965, 4966—and being thus based upon a consideration illegal in part, the whole contract was void.

V. S. 1370.—The plaintiff had a right to cross examine the claimant fully as to the consideration upon which the assignment was made.

Paying under Order after Service of Trustee Process.—Although the trustee had no information but that the order was what it purported to be, it was not justified in honoring it after the service of the trustee process, for that was notice that the ownership of the funds was in question.

TRUSTEE PROCESS. Heard upon commissioner's report and exceptions thereto, at the June term, 1898, Orange

county, *Start*, J., presiding. Trustee adjudged liable. The trustee and claimant excepted.

The order directed the payment to the claimant of all the defendant's wages then due and afterward to become due while in the employ of the trustee.

In the course of the examination of the claimant, counsel for the plaintiff, under exception, propounded various questions touching the nature of the consideration for the assignment and the intention of the parties in respect thereto, upon the answers to which the finding of the commissioner, quoted in the opinion, was based.

J. P. Lamson for the trustee.

Smith & Sloane for the plaintiff.

WATSON, J. The plaintiff contended before the commissioner that the order was given by the defendant to the claimant in fraud of creditors and, therefore, as against attaching creditors by trustee process, invalid. As bearing upon this question, the cross-examination of the claimant by the plaintiff's counsel, was proper. The claimant, by procuring the trustee's acceptance of the order and lodging the same in its office, notified the trustee of the assignment of the demand due from it, here sought to be held by the claimant. The validity of that assignment was brought in question by the plaintiff, and, under the provisions of § 1370, V. S., he had a right thus to examine the claimant concerning the consideration upon which the assignment was made.

At the time the order was given, the defendant was owing the claimant about twelve dollars for money previously borrowed, and wanted to borrow more money, and the claimant demanded security, whereupon the order was given and the claimant let the defendant have twenty dollars more. Thereafter the claimant drew all of defendant's pay from the trustee and therefrom let the defendant have what money he wanted, from time to time,

and kept the rest himself. The amount in the hands of the trustee, at the time of the service of the trustee process upon it, was thirty-three dollars and twenty-two cents, but whether it was enough to pay the claimant in full did not appear. The trustee subsequently paid this money to the claimant. The claimant drew defendant's pay from the trustee five times on the order, and in all, over two hundred dollars.

The commissioner has found "that the order was given for the purpose, among other things, of preventing other creditors trusteeing, and to enable the claimant to take out of the monthly pay such sum as the debtor saw fit to let him take." To the extent of the debt honestly due and owing from the defendant to the claimant, the contract of assignment was made on a valuable and legal consideration, but beyond that, as appears by the above finding, the consideration was in contravention of the statute against fraudulent conveyances—§§ 4965, 4966, V. S.—and illegal; and the contract being made in part on an illegal consideration, the whole contract is void. Chit. on Con. 730; *Woodruff* v. *Hinman*, 11 Vt. 592; *Shelley* v. *Boothe*, 73 Mo. 74: 39 Am. Rep. 481; *Roberts* v. *Barnes*, 127 Mo. 405: 48 Am. St. Rep. 640; *Baldwin* v. *Short*, 125 N. Y. 553.

The trustee had no information but that the order was what it purported to be on its face, but this was no legal excuse for paying over the funds, in its hands, to the claimant, after service of the trustee process upon it. The service of that process was a sufficient notice that the ownership of those funds was in question, and for its own protection, it should have awaited the judgment of the court thereon, before paying the funds to any one. Not so to do, was to act at its peril. *Wheeler* v. *Winn and Trustee*, 38 Vt. 122. The case is clearly within the provisions of § 1370, V. S. and

Judgment must be affirmed.

JOHN KELLEY *vs.* THE TOWN OF MORETOWN.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed May 31, 1899.

Jurisdiction.—Under the charter of the city of Barre, the city court has no jurisdiction of a cause unless one of the parties thereto resides in the city or town of Barre, or unless both are non-residents of the State; and the county court upon appeal has none.

Jurisdiction—Pleading.—Advantage may be taken of such want of jurisdiction at any stage of the proceedings.

Jurisdiction—Pleading.—The charter provision is distinguishable from the statute governing the place of trial in actions before justices, where advantage must be taken by dilatory plea or motion, for in those cases jurisdiction does not depend upon the residence of the parties.

GENERAL AND SPECIAL ASSUMPSIT. Plea, the general issue. Trial by jury, at the March term, 1898, Washington county, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

Senter & Goddard for the defendant.

John W. Gordon for the plaintiff.

WATSON, J. The defendant was summoned before the city court of the city of Barre, in an action of general and special assumpsit, "to answer to John H. Kelley of Moretown, R. W. Kelley, plaintiff in interest of town of Barre, in the county of Washington." The special count in the declaraction is based upon a contract alleged to have been made by the defendant with the plaintiffs for the use and occupation of a certain dwelling-house owned by the plaintiffs. Judgment was rendered for the plaintiffs in the city court and the defendant appealed therefrom to the county court. On trial of the case in the county court, the only contract or cause of action upon which the plaintiffs sought to recover, was that set forth in the special count.

It appeared by the evidence introduced that the house in question was owned by John Kelley, and that R. W. Kelley, at the time of said contract for renting, had no interest therein; that the contract, under which it was used and occupied by the defendant, was made with John Kelley alone, and that the claim for the use and occupancy of the house, here sought to be recovered, after it had accrued against the defendant and before the bringing of this suit, was assigned to R. W. Kelley whose sole interest therein was as such assignee.

After the evidence was closed, the defendant moved for a verdict "for the reason of a variance between the proof and the declaration; the declaration putting the cause of action in both of these plaintiffs, and the evidence in favor only of the plaintiff John."

In an action at law to recover a non-negotiable chose in action, all parties named as plaintiffs must be privy to the contract declared upon, for no one can sue or be sued upon a contract who is a stranger to it. Dicey on Parties to Actions, 10, 78; 1 Chit. Pl. 2; *Hall* v. *Huntoon*, 17 Vt. 244.

If R. W. Kelley is to be treated as a co-plaintiff, the variance between the contract proved and the one alleged in the declaration is material and would be fatal to the action, at common law; *Vail* v. *Strong*, 10 Vt. 457; *Mann* v. *Birchard*, 40 Vt. 326; but, under § 1148, V. S., the writ and declaration would be amendable by striking out the name of R. W. Kelley, improperly joined as plaintiff, thereby leaving, as sole plaintiff, John Kelley, who, as appeared by the evidence introduced on the trial, at the time of the commencement of this action, resided in the town of Berlin and not in the city or town of Barre.

At the close of the evidence for the plaintiffs, the defendant moved that the action be dismissed for that the city court in which the action was commenced, had no jurisdiction, and to the overruling of this motion the defendant excepted.

In determining this question, it makes no difference

whether R. W. Kelley is treated as a co-plaintiff improperly joined, with the writ and declaration to be amended as hereinbefore indicated, or as being named in the writ simply to show that he is the plaintiff in interest and that the suit is brought for his benefit; either way, the legal plaintiff is John Kelley, and the question of jurisdiction must be determined upon that basis.

It is provided by § 24 of the city charter, that "The city court shall have jurisdiction of all actions of a civil nature, if either of the parties reside in the said city or town of Barre at the time of the commencement of the action, or if neither party reside in the State at such time . . . . . where the debt or other matter in demand does not exceed five hundred dollars."

The plaintiffs' contention that these provisions so much resemble those in § 1040, V. S., defining the jurisdiction of a justice, as to warrant a similar construction, is not tenable. The jurisdiction of a justice of the subject matter is determined wholly by the amount of the debt or other matter in demand, without regard to the residence of the parties; *Bell* v. *Mason*, 10 Vt. 509; *Parkhurst* v. *Spalding*, 17 Vt. 527; *Danforth* v. *Streeter*, 28 Vt. 490; *Edgerton* v. *Smith*, 35 Vt. 573; but the place where writs in justices' suits shall be made returnable is determined by the residence of the parties, if either is an inhabitant of the State—§ 1146, V. S.—and if such writ is made returnable in any other town than where one of the parties resides, it is but an irregularity of process, and is waived by the defendant, unless advantage thereof be taken within the rules of dilatory pleading; *Collamer* v. *Page*, 35 Vt. 387; *Eaton* v. *Houghton*, 1 Aik. 380; while the jurisdiction of the city court depends not only on the fact that the amount of the debt or other matter in demand does not exceed five hundred dollars, but also on the fact that one of the parties, if a resident of the State, resides in the city or town of Barre at the time of the commencement of the action. These two

facts are jurisdictional and must concur. If either is wanting, the court has no jurisdiction of the subject matter.

In the case at bar, both parties resided in the State and neither party resided in the city or town of Barre, at the time of the commencement of the action, and the city court had no jurisdiction of the subject matter, and could acquire none by consent of the parties. It follows that the county court had no jurisdiction. That the question of want of jurisdiction may be raised at any stage of the case, has been determined by this court in numerous cases, the last of which is *Sanders* v. *Pierce*, 68 Vt. 468.

Judgment reversed, motion to dismiss for want of jurisdiction sustained, and cause dismissed with costs to defendant.

W. L. LOCKE *vs.* A. B. POST and tr.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, START, THOMPSON and WATSON, JJ.

Opinion filed May 11, 1899.

Trustee Process.—V. S. 1313 excepts from trustee process the proceeds of property which was exempt from attachment at the time of the sale and the exemption in the case of a homestead is in no way dependent upon the debtor's continuing to be a housekeeper, nor upon his intention to acquire another homestead, nor upon the intent with which he keeps the proceeds.

TRUSTEE PROCESS. Heard upon the report of the commissioner, at the September term, 1898, Orleans county, *Munson*, J., presiding. Trustee discharged with costs. The plaintiff excepted.

John Young and *W. W. Miles* for the plaintiff.

We are aware that V. S. 1313 provides that "no person except as herein otherwise provided shall be liable on trustee process on account of the sum due or owing to the principal debtor for property sold or conveyed or delivered to him which was at the time of the sale exempt from attachment and execution." But we submit that it is "otherwise provided" by V. S. 2179, which declares that "the homestead of a housekeeper or head of a family . . . used or kept by such housekeeper or head of a family as a homestead, shall . . . . be exempt from attachment and execution." The decisions of this court have settled the meaning of this section to be that the homestead should be protected only while used or kept for that purpose. The exemption of the homestead is a qualified exemption. Why should the proceeds be better protected than the thing itself?

E. A. Cook and *J. W. Redmond* for the trustee and claimant.

START, J. The defendant, on the 21st day of March, 1895, was the owner of a homestead, and on that day sold and conveyed the same to the trustee and took in payment therefor the notes sought to be charged by the trustee process. On the 25th day of March, 1895, he broke up housekeeping and has not since been a housekeeper. The plaintiff insists, that, inasmuch as the defendant has not been a housekeeper or head of a family since he parted with his homestead, and inasmuch as it does not appear that he has kept the proceeds of the homestead to use in buying another, the same are subject to attachment by trustee process.

It was not necessary for the defendant to continue a housekeeper after he had sold his homestead, in order to exempt the notes from attachment by trustee process; nor was it necessary that he should keep the notes with an intention of using them in buying another homestead; nor was it necessary that he should have had such intention at

the time the trustee process was served. The statute does not require the proceeds to be kept, under the same conditions that an unoccupied homestead is kept, in order to exempt them from trustee process. The statute provides that no person, except as therein otherwise provided, shall be liable on trustee process, on account of a sum due or owing to the principal debtor for property sold or conveyed or delivered to him, which was at the time of sale exempt from attachment and execution. V. S. 1313.

The homestead was exempt from attachment and levy upon execution, and the only provision of the statute which relates to the attachment of the proceeds of the homestead, that has any application to this case, is § 1313. By this section, the exemption is in no way dependent upon the debtor's continuing to be a housekeeper, nor upon his intention to acquire another homestead, nor upon the intent with which he keeps the proceeds. The liability of the trustee is made to depend upon whether the property was, at the time of sale, exempt from attachment and levy upon execution. The sum due and owing from the trustee to the principal defendant being for property sold which was, at the time of the sale, exempt from attachment and levy upon execution, the trustee is not chargeable.

Judgment affirmed.

HOSEA MANN, Inspector of Finance, *vs.* THE BRADFORD SAVINGS BANK AND TRUST COMPANY.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and THOMPSON, JJ.

Opinion filed May 11, 1899.

Receiver—Distribution of Assets of Insolvent Trust Company—V. S. 4062.—This suit was instituted and a receiver appointed under the law applicable to "insolvent banking associations," an expression which by virtue of V. S. 4106 and 4123 includes savings banks and trust companies; and the assets must be distributed under that law, and not in the manner provided by its charter in case of its dissolution,—a contingency which has not yet occurred.

Dissolution.—The court will not pass upon the rights of creditors in case of dissolution before the dissolution occurs.

CHANCERY. Heard upon an agreed statement of facts, at the June term, 1898, Orange county, before *Tyler*, Chancellor, who entered a *pro-forma* decree as stated in the opinion with direction to the receiver to appeal therefrom to the supreme court. The petitioner appealed.

The agreed statement submitted the question, how the assets should be distributed in case of a dissolution, setting forth that in the performance of his trust under the direction of the court of chancery the receiver had been proceeding in accordance with V. S. chapters 173 and 174 and that an order for a dividend to the creditors could not be made until the questions of preference had been determined. The court of chancery directed the receiver to appeal from its order to the supreme court, that the questions involved might be determined by said court as early as convenient and before the expense of a trial upon the question of a dissolution of the corporation had been incurred.

Hunton & Stickney for the receiver.

Clarke C. Fitts for certain creditors claiming preference.

START, J. The defendant was organized as a savings bank and trust company in 1871 under a special charter granted in 1870, and did business as such until February 1, 1898, when, upon application of the inspector of finance, the court of chancery appointed a receiver to take charge of the assets of the defendant; and the cause comes to this court by appeal from the order of that court, that, upon the dissolution of the corporation, the debts of the creditors specified in the charter as preferred in case of the dissolution of the corporation be first paid out of the assets in the hands of the receiver. The corporation has not been dissolved, and this court will not pass upon the rights of its creditors, in case the corporation is dissolved, in advance of such dissolution. *Turner's Estate* v. *Lyman*, 64 Vt. 167. V. S. 4123, provides that the provisions of law applicable to insolvent banking associations shall regulate proceedings against insolvent trust companies, and the final distribution of their assets. V. S. 4106, provides that the words "trust company" shall be construed to include savings bank and trust company.

This suit was instituted and a receiver appointed under the law applicable to insolvent banking associations, and the assets in the hands of the receiver must be distributed under that law. The law relating to the distribution of the assets of an insolvent banking association, V. S. 4062, provides that the assets of the association that come into the control of the receiver shall be applied: (1) To the payment of the costs of the proceeding. (2) To the payment of the circulating bills or notes of the association which are proved as provided in this chapter. (3) To the payment of money deposited with the association by savings banks or savings institutions existing under the laws of this State, but not exceeding the amount which such banks or institutions are allowed by law to deposit with such association. (4) To the payment of other creditors. The creditors of each class shall be paid *pro rata* and no creditors

of any class shall be paid until the creditors of the preceding classes have been paid in full. These are the only provisions of law for the distribution of the assets of a trust company in the hands of a receiver, appointed under the law applicable to insolvent banking associations, and the assets in the hands of the receiver in this cause must be distributed in accordance with these provisions. In the statement of facts, the several classes of debts which it is claimed are preferred, are specified, and it does not appear that there are any circulating bills or notes, or that there are any debts in favor of savings banks or savings institutions. Therefore, the assets remaining in the hands of the receiver, after paying the expense of the receivership, must be applied *pro rata* to the payment of such debts of the corporation as have been proved and allowed in this cause and remain unpaid.

Decree reversed and cause remanded, with mandate.

GEORGE H. WOODS, admr., *vs.* EUGENE H. DARLING.

May Term, 1899.

Present: TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed June 14, 1899.

Discontinuing Defective Suit.—In this State the rule has always been that where a suit has been commenced by process which is defective, it may be discontinued, even by oral notice, and thereupon a second suit may be brought, which shall not be considered vexatious.

Abatement—Pendency of Former Action.—A writ was made returnable to a stated term of the county court, but was duly entered within twenty-one days from its date. The defendant's attorney appeared and filed a motion to dismiss because the writ directed the defendant to appear within twenty-one days from its date, instead of forty-two days as the statute requires. Thereupon the plaintiff, in vacation, discontinued the

first suit and gave the defendant written notice thereof, and then commenced the present suit, before action had been taken by the court upon the first. *Held*, that the second action was not abated by the first.

BOOK ACCOUNT. Pendency of former action pleaded in abatement. Traverse. Heard on an agreed statement at the December term, 1898, Orange county, *Rowell*, J., presiding. Plea overruled. The defendant excepted and the cause was passed directly to this court.

Darling & Darling and *George L. Stow* for the defendant.

If the action of assumpsit, entered in court September 29, 1898, was pending and undetermined therein when the present action of book account for the same cause was commenced, the former abates the latter. *Hill* v. *Dunlap*, 15 Vt. 645; 1 Chitty Pl. 454; Gould Pl., c. V. § 122.

The first suit between these parties was pending from the moment that service of the writ therein was completed. *Hall & Chase* v. *Peck*, 10 Vt. 474; *McDaniels* v. *Reed*, 17 Vt. 674; *Stanley* v. *Turner*, 68 Vt. 315; *Howard* v. *Bartlett*, 70 Vt. 314; *Burlington* v. *Traction Co.*, 70 Vt. 491.

After suing out the writ in the first action, the plaintiff was obliged to enter it in court within twenty-one days from its date, otherwise it would abate upon motion. V. S. 1089. He did so enter it, and thus signified his intention of proceeding thereunder. The defendant was then compelled to enter his appearance, to save a judgment by default. V. S. 1090, 1092. He accordingly appeared and filed his motion to dismiss the writ before being notified of the plaintiff's intention to discontinue. The case was then out of the plaintiff's exclusive control, and could not be discontinued in vacation and without permission from either the court or the defendant. *Jenney* v. *Glynn*, 12 Vt. 480; *Conn. & Pass. R. R.* v. *Newell*, 31 Vt. 370; *Dunklee* v. *Goodenough*, 65 Vt. 257; *Gamsby* v. *Ray*, 52 N. H. 513.

It is true that by V. S. 1403 a discontinuance by the plaintiff may entitle the defendant to a judgment for costs; but until such a judgment has been rendered, is the

discontinuance perfected? This statute plainly implies that the matter of discontinuing a suit is under the control of the court.

In *Whitmore* v. *Williams*, 6 T. R. 765, it appeared that the plaintiff, after commencing an action, discovered a mistake in it, before the defendant had pleaded. He thereupon served upon the defendant a rule to discontinue, but took out no appointment to tax costs. He then brought this action, and the defendant pleaded the first in abatement. The court held that the rule to discontinue did not of itself discontinue the former action, as costs must be due the defendant thereon, for the taxation of which an appointment should have been taken out.

Under a statute in Massachusetts, similar to V. S. 1403, it was held that a discontinuance, to be effective, must appear of record. *Gilbreth* v. *Brown*, 15 Mass. 178.

Our rules of court recognize the necessity of an entry upon the docket, in order to effect a discontinuance; and, upon principle, it would seem that after a defendant has appeared and moved to dismiss, the plaintiff would not be allowed to have an entry of "*discontinued*" made *in court*, even, for that bare entry would not entitle the defendant to costs. County Court Rule, 17.

There are three cases which will probably be claimed to be opposed to our contention, viz.: *Hill* v. *Dunlap*, *supra*; *Downer* v. *Garland*, 21 Vt. 362; and *Kirby* v. *Jackson*, 42 Vt. 552. But they are all clearly distinguishable from the case at bar.

Hill v. *Dunlap* (in which it appears that the writ in the first suit was *never entered*), holds that "if the party bring a defective suit he may, upon discovering the defect discontinue that suit, and bring another, and this shall not be considered vexatious." But if, instead of discovering the defect himself, he has it pointed out for him by plea or motion, can he make the defendant's discovery advantageous to himself and a means of further cost to the defendant?

In *Downer* v. *Garland*, *supra*, the plaintiff's notice of discontinuance was given in term time, and the suit was discontinued accordingly, which is the contention of this defendant. But the opinion in that case misinterprets the cases. In neither *Durand* v. *Carrington*, 1 Root, 355, nor in *Hill* v. *Dunlap*, had the writ been entered in court when the plaintiff sought to discontinue his action. Moreover, that opinion gives as a reason for not treating the second suit as vexatious, that the first was manifestly ineffectual and in fact void, the justice who signed the writ being the plaintiff's attorney. Not so, however, in the case at bar. If the defendant had appeared generally in the first suit, instead of interposing his dilatory motion, a judgment in the plaintiff's favor would have been valid. *Stone* v. *Van Curler*, 2 Vt. 115; Freem. Judgt. § 120a.

Downer v. *Garland* merely decides that a plaintiff, in a void and therefore "ineffectual" suit, may, by giving defendant a written notice in term time, discontinue his action and bring a new one directly, if within reasonable time,—in that case, three days—an entry of nonsuit having been made on the clerk's docket. Whatever else, if anything, is contained in that opinion to indicate that a plaintiff *in vacation*, by giving a defendant a written notice, thereby at once and without further procedure discontinues his suit, is *obiter*.

R. M. Harvey for the plaintiff.

TYLER, J. On September 8, 1898, the plaintiff brought an action of general assumpsit against the defendant, making the writ returnable to the December term, 1898, of Orange county court; service was made upon the defendant September 9th, and the case was duly docketed September 27th. The defendant's counsel entered their appearance and filed a motion to dismiss the writ for the reason that it directed the defendant to enter his appearance within twenty-one days from its date instead of forty-two days as

the statute required. The plaintiff then, and before the service of the writ in the present action, discontinued the first suit and gave the defendant a written notice thereof. He then brought the present action to which the defendant pleaded in abatement, alleging the pendency of the former suit. The question is whether the first suit was in fact pending when the second one was brought.

The rule of the common law required the second suit to be abated upon the supposition that it was unnecessary and vexatious, and that a man ought not to be harassed by two suits pending at the same time for the same cause of action.

In New Hampshire it has been held that a plaintiff cannot before entry discontinue his suit without the defendant's consent and thus avoid a plea of a former action pending. *Bennett* v. *Chase*, 21 N. H. 570; *Gamsby* v. *Ray*, 52 N. H. 513. In the latter case the court reasoned that the law abhorred a multiplicity of suits, and that if a plaintiff might bring one suit and discontinue it he might annoy the defendant indefinitely; that under the liberal practice in that state allowing amendments it was more expedient that the second suit should abate than that the court should try the collateral question whether or not it was vexatious. *Downer* v. *Garland*, 21 Vt. 362, is, however, quoted as holding a different rule.

In this State the rule has always been that where a suit has been commenced by a process which is defective, it may be discontinued; that a second one may be brought, and that the second will not be considered vexatious; also, that the first suit may be discontinued by oral notice.

The defendant contends that, as the present statute requires cases to be docketed in vacation and appearance to be entered within a certain time, the plaintiff had no right to discontinue his case, take it out of the control of the court and prevent a hearing upon the plea or motion. We think, however, that the facts that the case had been docketed and an appearance entered afford no reason why

the plaintiff might not enter a discontinuance out of term. The case was then no longer in court to affect the right of the plaintiff to bring another suit, but it remained in the control of the court upon all questions of costs. V. S. 1403 is as follows: "If a person causes process to be served on another and discontinues his suit, or becomes nonsuit therein, or if such suit is abated or dismissed for want of jurisdiction, the court to which such process is made returnable shall give judgment for the defendant to recover reasonable costs." . . . The above section, as it stood in G. S. 267, § 42, was held to relate to suits that had been entered in court, yet by an equitable construction of the term "reasonable costs" was also held to cover such costs as had accrued to the defendant before the suit was discontinued, though before the return day, as costs for summoning witnesses or in taking depositions. In such cases the court, on complaint or petition, has power after discontinuance to render judgment for taxable costs. *Fullam* v. *Ives*, 37 Vt. 659; *Mead* v. *Arms*, 2 Vt. 180. This seems to obviate the defendant's objection to a discontinuance after the docketing and appearance. We find no occasion to apply a different rule from that laid down in *Hill* v. *Dunlap*, 15 Vt. 645; *Downer* v. *Garland*, *supra*; and *Kirby* v. *Jackson*, 42 Vt. 552.

Judgment affirmed and cause remanded.

TURNER FALLS LUMBER CO. *vs.* CHARLES E. BURNS.

May Term, 1899.

Present: TAFT, C. J., TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 5, 1899.

Evidence—Declaration of Deceased Person as to Boundaries.—A declaration touching the boundaries of land, made by one who is at the time upon or near them and pointing them out, may be received as evidence of their location, after the decease of the declarant, if it appears from other sources than the declarant's own statement, that he had knowledge, or peculiar means of knowledge, with no special interest to misrepresent, and if from lapse of time there is no reasonable probability that testimony of those having actual knowledge can be obtained.

Apparent Lines—Real Lines—Finding of Referee Conclusive.—There was nothing in the case to show that the parties contracted with reference to the apparent lines instead of the true ones, and the finding of the referee as to the correct location is conclusive.

Division Line—Payment under Mistake.—The parties owned adjoining lands; neither knew where the line was; neither claimed it to be in any particular location. The plaintiff bought timber on the defendant's land and a surveyor mutually agreed upon ran the line between the lands, and ran it wrong. Relying upon it as correct, the plaintiff paid the defendant for timber which it had cut upon its own land. *Held*, that the plaintiff might recover the payment as having been made under a mutual mistake of fact, for the plaintiff was not estopped, and it was not a case of compromise for there had been no dispute between the parties when the line was run.

Law or Fact.—The ownership of property is a matter of fact, although it may result from a question of law.

Demand—Necessity for.—A demand was unnecessary, for the plaintiff was not in fault and the defendant was, having sold the timber to the plaintiff by representing that he owned the disputed land and having assisted the surveyor in running the line.

GENERAL ASSUMPSIT. Heard on the report of a referee, at the March term, 1899, Essex county, *Rowell*, J., presiding. Judgment for the defendant. The plaintiff excepted.

This action was brought to recover back money paid by the plaintiff to the defendant for timber taken from the

plaintiff's own land. The plaintiff and the defendant were adjoining owners and the line between their lands was uncertain. The plaintiff bought the timber of the defendant upon the land in question upon the latter's representation that the land belonged to him and a surveyor was agreed upon who, with the assistance of the defendant, ran the line and ran it as the referee finds erroneously. Relying upon the line as run the plaintiff after cutting off the timber paid the defendant for it and afterwards without making any demand for the return of the payment brought this suit to recover it back.

Bates, May & Simonds and *Ladd & Fletcher* for the plaintiff.

Harry Blodgett and *Dunnett & Slack* for the defendant.

TAFT, C. J. (1) The testimony showing the declarations of the deceased persons, Stewart and Bell, was admitted under exception. That hearsay evidence is not admissible, is a general rule. There is an exception to the rule which is well stated in *Wood* v. *Willard*, 37 Vt. 377. The declarations of deceased persons in respect to the boundaries of land may be admitted under certain conditions. The question before us is, does the testimony fall within the exception. The facts making such testimony admissible are not to be proved by what the declarant said but must be proved by other means. One condition of its admissibility is, that it must be shown the deceased person had actual knowledge, of the boundaries of the lands, or, that from his connection with them, or their situation, and his experience in regard to such boundaries and the surveys of the land, he had peculiar means of knowledge, so that it may be fairly inferred he had actual knowledge of the same, with no interest to misrepresent, although not wholly disinterested in the subject. Such declarations made upon or in the vicinity of the boundaries and pointing them out, may be received as to their location, when from lapse of time there

is no reasonable probability that testimony can be obtained from those who had actual knowledge on the subject. That Stewart and Bell had actual knowledge on the subject upon which their declarations were given, may fairly be inferred from the facts shown. Bell was a surveyor, and put up "the old cedar stake" which marked the corners between ranges 4 and 5. He owned lot 19 in range 5, and Stewart owned the corresponding lot 19 in range 4. The two were upon the premises, were there for the purpose evidently of marking the corners, for Bell then put up the cedar stake, and both declared it to be the original corner. It is inferable that they had actual knowledge of the location of the corners. It does not appear from the report that the deceased persons had any interest to misrepresent, nor that the time when the declarations were made was so recent that there was a reasonable probability that testimony could then be obtained from those who had actual knowledge on the subject; these facts must appear to justify us in reversing the ruling of the referee. The testimony was properly admitted. See *Child* v. *Kingsbury*, 46 Vt. 47.

(2) There was testimony in the case which tended to show the location of certain old fences and lines of occupation, and spotted trees upon such lines, and the defendant claims that this testimony should be used as determinative of where the range lines of said lots are, for the reason that the parties must have contracted with reference to the apparent lines as shown by such fences and lines of occupation. There is nothing in the case to show that the parties contracted with reference to any apparent lines, and the question need not be considered. The testimony tending to show the old fences and lines was before the referee and was considered by him in connection with all the testimony in the case, and from it all he finds that the claimed apparent lines are not the true range lines, and his finding in that respect is conclusive.

(3) The defendant claims that the arrangement between

the parties by which surveyor Williams should run the line between the land of the respective owners was conclusive and binding upon them,—the principle which is applicable in cases of disputed boundary lines, and a compromise of such disputes.

The referee does not find anything in the proceedings in the nature of an adjudication, or such an acquiescence in the line run as would conclusively fix its location.

The defendant contends that this finding is a conclusion of law, and not warranted by the facts found by the referee; that the court should set aside such finding and draw such conclusions as the facts found warrant. If in fact it is a question of law, the conclusion drawn by the referee was correct. The parties owned adjoining lands; neither knew where the line was; neither claimed it to be in any particular location. The plaintiff bought the timber on the defendant's land and the surveyor ran the line between the lands and erroneously located it. There was no controversy of a disputed claim and a compromise thereof, presented by the evidence. The conclusion of the referee was correct. Upon the question of compromise see next point.

(4) The defendant insists that the case does not disclose a payment under a mistake either of law or fact. It is unnecessary for us to consider the effect of the mistake, if it was one of law. It was clearly one of fact. After the survey all the parties supposed that the division line was many rods from its true location, and so believing, the plaintiff paid the defendant for its own lumber. There was a mutual mistake as to its ownership. The ownership of property is matter of fact, although it may result from a question of law.

The defendant further insists under this point that the arrangement by which the line was run was binding upon all parties, in the nature of a compromise, and that the plaintiff is estopped from disputing it.

In regard to the parties being bound by the running of the

line by Williams, the case is analogous to *Burnell* v. *Maloney*, 39 Vt. 579, in which adjoining owners procured a surveyor to run the lines dividing their lands, and upon hearing, it was insisted that the division line thus established was conclusive upon the parties. *Pierpoint*, C. J., says in the opinion, "All agreed that Withers was entitled to 150 acres to be taken off the south end of the gore, by a line to be run parallel with the south line thereof. All that the parties attempted to do on the occasion referred to was to run that line; in running it, Saxe, the surveyor, by mistake run it too far south, so that it did not give Withers the 150 acres, to which he was entitled. We think it has never been held that such a transaction is conclusive upon the parties to it."

(5) The defendant further insists that the sale was one of personalty, and that the plaintiff having taken the property, cannot now claim that the line was erroneously located. That it adopted the line and cannot now deny it. This view cannot prevail against the principle applicable in case of a mutual mistake.

(6) The defendant contends that the payment was a voluntary payment and cannot be recovered back, and cites *Stevens* v. *Head*, 9 Vt. 174; *McDaniels* v. *Bank of Rutland*, 29 Vt. 230; *Taggart* v. *Rice*, 37 Vt. 47.

It is held in these cases that when one pays money which he is under no legal obligation to pay with full knowledge of the facts he cannot recover it back. Such is not the case before us, but a payment made under a mutual mistake.

(7) Was a demand necessary to enable the plaintiff to maintain its action. The rule stated in *Varnum* v. *Highgate*, 65 Vt. 416, that "when the payor is not in fault, and the payee receives the money in his own wrong, no demand is necessary," is well settled with us.

In our cases in which a demand has been held necessary the payor was held to be in fault in *Stoddard* v. *Chapin*, 15 Vt. 443; *Brainerd* v. *Cham. Tr. Co.*, 29 Vt. 154; *Gillett* v.

Brewster, 62 Vt. 312, and the payee not in fault in *Bishop* v. *Brown*, 51 Vt. 330.

In the case before us the plaintiff was not in fault, and we hold the defendant received the money in his own wrong. The plaintiff knew nothing of its lot lines. It was induced to purchase the timber by the representations of the defendant that he owned the land in dispute and the line was run by the surveyor and the defendant. Bowman, the representative of the plaintiff, being there simply to mark the trees. The defendant was responsible for the error in locating the division line. The suit can be maintained without previous demand, under the rule laid down in *Varnum* v. *Highgate*, *supra*

Judgment reversed and judgment for the plaintiff.

FLORA BRAINARD *vs.* THOMAS H. VAN DYKE.

January Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed May 27, 1899.

Contributory Negligence—Declaration Insufficient in Failing to Negative. The plaintiff sought to recover damages resulting from the defendant's negligence in placing dynamite in a hot oven in a dwelling house where the plaintiff was acting as the defendant's servant. The declaration alleged that the defendant did not notify the plaintiff of the dangerous character of the dynamite, but failed to allege that the plaintiff was ignorant of its dangerous character, and the declaration was held insufficient.

Contributory Negligence—Declaration Insufficient in Failing to Negative. —This defect was not aided by an allegation that the dynamite exploded without the fault of the plaintiff.

Facts Are to Be Pleaded, not Legal Conclusions.—When a party seeks to avoid the effect of an alleged accord and satisfaction by reason of fraud,

it is not enough to say that the accord and satisfaction were procured by the fraud of the other party; he must go further and set forth the facts which constitute such fraud as will render the accord and satisfaction voidable.

Settlement—Rescission.—In this State it may be regarded as settled that when one has received anything of value in settlement of a right of action, the contract of settlement although obtained by duress and fraud, is a bar to a recovery at law so long as it is not rescinded by an offer to return the consideration in so far as it lies within his power to do so.

Settlement—Rescission—Pleading.—A plea of accord and satisfaction is not answered by a replication that the settlement was procured by the fraud of the defendant, without alleging a return or tender of the consideration received.

Reasonable Time a Question of Fact.—A replication of duress to a plea of release and discharge under seal need not allege a repudiation of the release, for the commencement of the suit is itself a repudiation, and the question whether action was taken within a reasonable time is one of fact and not of law.

Duress.—Duress is but a species of fraud, and contracts induced by it are not void, but voidable only, and must be renounced by some distinct act, and the consideration if of value must be returned if it is within the power of the receiver to do so.

CASE for negligence. Came on for hearing upon demurrer to the replication, at the September term, 1898, Essex county, *Taft*, J., presiding. Judgment, *pro forma* that the demurrer be overruled and the replication adjudged sufficient. The defendant excepted.

The pleadings are sufficiently stated in the opinion..

Henry C. Ide and *Drew, Jordan & Buckley* for the defendant.

Bates, May & Simonds for the plaintiff.

START, J. The negligence set forth in the declaration consisted in the defendant's placing dynamite in a hot oven, situated in a dwelling house where the plaintiff was in the discharge of her duties as the defendant's servant, with his knowledge, without notifying the plaintiff of the dangerous character of the dynamite. It is insisted by the defendant that the declaration is insufficient in that it is not alleged

therein that the plaintiff did not know of the dangerous character of the dynamite. If the plaintiff knew of the dangerous character of the dynamite, she lost nothing by reason of the defendant's neglect to inform her of its dangerous character; and, without an allegation of want of knowledge on her part, she does not show such facts as cast a duty upon the defendant, for a breach of which an action can be maintained. It is alleged in the declaration that the defendant did not notify the plaintiff of its dangerous character, but this does not negative knowledge on her part. This might be true, and the plaintiff have knowingly remained in a place of danger and assumed the risk of doing so. It is further alleged in the declaration, that, without any fault of the plaintiff and wholly by the negligence of the defendant, the dynamite exploded. This averment relates only to the cause of the explosion and does not negative knowledge on the part of the plaintiff. It simply shows that the dynamite exploded without the fault of the plaintiff.

The defendant's third plea alleges that the defendant delivered and paid to the plaintiff, and the plaintiff accepted and received from the defendant, the sum of one hundred dollars in full satisfaction and discharge of all the greivances set forth in the declaration. The replication to this plea alleges that the supposed payment and settlement of the one hundred dollars set forth in the plea were had and obtained from her, the plaintiff, by the unlawful imprisonment and fraud of the defendant. The pleader evidently intended to allege that the plaintiff was induced to receive the money, and the settlement was obtained, by the unlawful imprisonment of the plaintiff and the fraud of the defendant. Assuming that such is the fair meaning of the replication, we think it is defective in that it does not set forth the facts and circumstances constituting the fraud. When a party seeks to avoid the effect of an alleged accord and satisfaction by reason of fraud, it is not enough to say

that the accord and satisfaction were procured by the fraud of the other party. He must go further and set forth the facts which constitute such fraud as will render the accord and satisfaction inoperative and voidable. The evidence and legal conclusions should not be set forth, but the substantive facts constituting the alleged fraud should be shown by the replication, and their effect left for the consideration of the court. 7 Ency. Pl. and Pr., 247. Whether the fraud be alleged in the declaration, plea or replication, it is essential that the facts and circumstances constituting it should be set out clearly and concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer, 5 Id., 687. Fraud is a conclusion of law from facts stated, and it is a well settled rule of pleading that facts, and not legal conclusions, are to be pleaded. Mere general averments of fraud or fraudulent conduct of a party, without the facts, do not constitute a statement upon which the court can pronounce judgment. 5 Id. 688. If fraud is relied on, it is not sufficient to make the charge in general terms. The defendant should not be subjected to being taken by surprise, and enough should be stated to justify the conclusion of law, though without undue minuteness. *St. Louis and San Francisco R. R. Co.* v. *Johnstown*, 133 U. S. 577: L. ed. 33, 687. In *Wright* v. *Bourdon*, 50 Vt. 494, the declaration was held bad for not alleging the facts and circumstances constituting the alleged fraud. Also, in *Cohn* v. *Goldman*, 76 N. Y. 284, it was held that the allegation "in concert did by connivance, conspiracy and combination cheat and defraud the plaintiff out of" certain goods, did not state facts sufficient to constitute a cause of action.

The replication is also insufficient, in that it is not alleged that the one hundred dollars was returned or tendered to the defendant. In this State it may be regarded as settled that, when one has received anything of value in settlement of a right of action, the contract of settlement, although

obtained by duress and fraud, is a bar to a recovery at law so long as it is not rescinded by an offer to return the consideration, in so far as it lies within his power to do so. Thus in *Town's Admr.* v. *Waldo*, 62 Vt. 118, the defendant pleaded accord and satisfaction, and the plaintiff admitted the receipt of the alleged consideration for the settlement and sought to avoid the compromise on the ground that it was procured by the defendant's fraud; and it was held that on discovering the fraud he was bound to disaffirm the transaction by returning the property received. Also, in *Downer* v. *Smith*, 32 Vt. 7, it is said: "It is a common principle, that when one has a right to rescind a contract, and exercises that right, he must restore the other party to the same condition that he would have been in if no contract had been made; but a defrauded party does not lose his right to rescind because the contract has been in part executed, and the parties cannot be fully restored to their former position, but he must rescind as soon as the circumstances will permit."

The case of *Mullen* v. *Old Colony R. R. Co.*, 127 Mass. 86, relied upon by the plaintiff, is not in conflict with this holding. In that case, the plaintiff did not admit that he received the money in settlement of the alleged cause of action. He claimed that the money was paid and received as a gratuity. In the course of the opinion, it is said: "It is well established that, if a party enters into a contract and in consideration of so doing receives money or merchandise, and afterward seeks to avoid the effect of such contract as having been fraudulently obtained, he must first give back to the other party the consideration received." The plaintiff by her replication does not deny the receipt of the money in settlement of the alleged cause of action, but in effect says that she was induced to receive it and make the settlement by the fraud of the defendant. This is, in effect, an admission that she received the money as a consideration for the alleged settlement. As we have seen, she could not

keep the money and also repudiate the settlement. If she was induced to accept the money in full settlement of the damage she sustained by reason of the defendant's negligence, by fraud practiced by the defendant, and would disaffirm the compromise, she was bound to return the money within a reasonable time. If the settlement was induced by fraud, it was valid and binding upon the plaintiff so long as she retained the money that was paid and received as a consideration therefor. Therefore, when she alleges that the settlement was procured by fraud practiced by the defendant, without alleging a return of the money or an offer to do so, she does not fully meet the issue of accord and satisfaction presented by the defendant's plea. While she holds the proceeds of the settlement, a trial of the issue of fraud would be of no avail. Whatever the finding might be, the defendant would still be entitled to judgment. As we have construed the pleadings, it stands conceded that the plaintiff has received one hundred dollars in full settlement of the alleged cause of action, still retains it, and has not offered to return the same to the defendant. There is, therefore, no material issue of fact to submit to a jury. The plaintiff can only meet the issue presented by the defendant's plea by a denial of the receipt of the money for the purpose alleged in the plea, or by putting in issue such facts as, if established, would render the facts set forth in the plea unavailing.

The defendant's second plea alleges, that the plaintiff, on the second day of July, 1892, by her release of that date, under seal, did release and discharge the defendant from all actions and causes of action by reason of the grievances complained of in the plaintiff's declaration. The plaintiff, by her replication, in effect, admits that she made the release as is in the plea set forth, but says, that, at the time of making the same, she was unlawfully imprisoned and detained in prison by the defendant, until, by force and duress of that imprisonment, she made the supposed release. There is nothing upon the record to show that the plaintiff did

anything to repudiate her deed until February 1, 1898, when she brought this suit; and the defendant insists, that, by this delay, the plaintiff has affirmed her deed, and that, when she brought the suit, it was too late to disaffirm it. Without deciding whether or not this objection can be taken by demurrer, we are of the opinion that we cannot hold as a matter of law that a reasonable time, in which to repudiate the release had expired when the suit was brought.

Duress is but a species of fraud, and contracts induced by it are not void, but voidable, and may be affirmed or repudiated in the same manner, and subject to the same conditions, that control when the contract is induced by fraud. Clark on Contracts, 356, 363; Blackstone's Com., vol. 2, 292; 2 Washburn, Real Prop., 2nd ed., 586; *Norton* v. *Gleason*, 61 Vt. 478; *Bank* v. *Wheelock*, 52 Ohio 534: 49 Am. St. Rep. 738; *Miller* v. *Minor Lumber Co.*, 98 Mich. 163: 39 Am. State Rep. 524; 9 Am. and Eng. Ency. of Law, 1st ed., 25. There must be some distinct act of renunciation. If the thing received as a consideration for the release is of no value, at law, a recision may be effected on the part of him who has the right, by notifying the other party that he repudiates the settlement, or by instituting legal proceedings against the other party upon the original cause of action. 21 Am. and Eng. Ency. of Law, 1st ed., 72, 73, and cases there cited.

As we have seen, if the release was induced by duress, it was voidable; and the plaintiff was bound to repudiate it within a reasonable time after the duress had ceased, by returning the consideration received for it in so far as it was within her power to do so, if the consideration was of any value. In this State, what is a reasonable time in which to repudiate a contract induced by fraud or duress, has usually been held to be a question of fact to be submitted to the jury or found by the trier of the issues of fact. Thus, in *Whitcomb* v. *Denio*, 52 Vt. 390, it is said: "Whatever may be the rule in other states in regard

to its being the duty of the court, when the facts are undisputed, to determine, as a matter of law, whether a thing has been done within a reasonable time, or with reasonable care, diligence or prudence, or to determine any other fact which involves the judgment of the trier upon an existing state of facts and circumstances, it has been the almost universal practice in this State, from the earliest recollection of the oldest members of the court and bar, to submit such question to the determination of the jury." In *Chamberlain* v. *Fuller*, 59 Vt. 252, it is said: "If the goods were obtained by fraud under the form of a contract, the plaintiffs had a right to rescind. Whether they acted with reasonable promptitude as soon as they discovered the fraud, was a mixed question of law and fact proper to submit to the jury." In *Norton* v. *Gleason*, *supra*, it is said: "Assuming that the law requires action at the earliest practicable moment, it would still be a question of fact, at least generally, when that moment arrived, even if there was no dispute as to the circumstances." This view has also prevailed in the Supreme Court of the United States. Thus, in *Andrews* v. *Hensler*, 6 Wall, 254: L. ed. 18, 737, it is held, that what is reasonable diligence is a question of fact, to be decided by the jury according to the special circumstances of each case.

The release, being under seal, imports a consideration, but what that consideration was, and whether or not it was in fact of any value, does not appear. If it was of no value, the plaintiff would not be expected to exercise that degree of diligence that would otherwise be required. Also, much depends upon the situation and relations of the parties, the circumstances, duration and effect of the duress, and whether, during the delay, the position of the defendant has been altered to his prejudice. *Whitcomb* v. *Denio*, *supra*; *Norton* v. *Gleason* *supra*. In view of these considerations, and the holding of this court respecting reasonable time in which to rescind a

contract for fraud or duress, the court will not, from the pleadings, hold, as a matter of law, that the plaintiff has not seasonably repudiated the release.

The first defect in the pleadings being in the declaration, the demurrer to the replications reach that defect, and notwithstanding the replication to the second plea would be a good replication to that plea, if the declaration were sufficient, the demurrer is sustained and the declaration adjudged insufficient.

Judgment reversed, demurrer sustained, declaration adjudged insufficient, and cause demanded.

L. H. ROSCOE *vs.* J. G. SAWYER.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed May 26, 1899.

The facts found are inconsistent with one another and afford no basis for a judgment in the plaintiff's favor.

CASE for deceit. Trial by court, at the March term, 1899, Chittenden county, *Taft*, C. J., presiding. *Pro-forma* judgment for the plaintiff for $96.04, damages, and costs. The defendant excepted.

George M. Powers for the defendant.

L. F. Wilbur and *Brown & Macomber* for the plaintiff.

ROWELL, J. This is case for deceit in obtaining credit by false representations. But the facts found cuff one another so that they cannot be said to show that credit was thus obtained. Although some of them show that it was, others show that it was not. Thus, it is expressly found that after

the time of the false representations, the plaintiff sold the goods in question to be paid for on delivery, and that he insisted upon payment C. O. D., and that payments were made by the defendant as a result of the plaintiff's attempt to collect pay therefor as fast as they were sold. With this finding it is impossible to say that the defendant obtained credit by reason of the false representations.

Judgment reversed, and judgment for the defendant.

RE W. H. H. CHAPMAN, insolvent debtor; E. G. WHITE, assignee appellant.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed June 5, 1899.

Appeal.—The appeal allowed by V. S. 2136, 2137, to the court of chancery from the decree of the court of insolvency granting or refusing a discharge, carries with it the right to an appeal from the court of chancery to the supreme court, for the chapter in which those sections occur expressly provides in what instances decrees shall be final, and this is not among them.

Right to a Discharge in Insolvency—Perjury.—A foreclosure suit upon a mortgage too old to be affected by the insolvency proceedings is not a part of those proceedings; and consequently perjury committed by the insolvent debtor in that suit is no bar to his discharge, under V. S. 2135.

Perjury—Attempted Preference.—The perjury was not in this case an attempted preference, for if successful it would not have affected the distribution of the debtor's estate among his creditors in insolvency.

CHANCERY. Appeal from the court of insolvency. Heard upon the report of the master and exceptions thereto, at the December term, 1898, Windsor county, before *Taft*, Chancellor, who affirmed the decree of the court of insolvency. The assignee appealed.

W. W. Stickney and *J. G. Sargent* for the appellant.

Gilbert A. Davis for the debtor.

THOMPSON, J. This is an appeal from the decree of the court of chancery affirming the decree of the court of insolvency granting the insolvent debtor a discharge from all debts and claims which by law may be so discharged.

The insolvent debtor insists that the appeal should be dismissed in this court because V. S. 2136 and 2137, which provide for an appeal to the court of chancery, contain no provision for an appeal from that court to the supreme court. Chap. 102, V. S., which relates to insolvency proceedings, expressly provides when the decision of any court therein mentioned shall be final. This being so, it is clear that when an appeal was allowed to the court of chancery, without any limitation as to the effect of its decrees, it was intended that the parties should have the same rights in that court as are allowed, by its rules of practice and the law, in other cases. This proceeding does not fall within the class of cases in which an appeal is denied by V. S. 981 but comes within its provisions allowing an appeal. Therefore, the motion to dismiss is overruled.

During the pendency of the proceedings in the court of insolvency, a suit was brought by a creditor against the insolvent debtor, in the court of chancery, to foreclose a mortgage given by him so long prior to the adjudication of insolvency as not to be affected by it. In that case, an issue arose between the petitioner and another mortgagee whether three hundred dollars paid such mortgagee, should be applied on a certain note held by him. The master finds that the insolvent debtor was improved as a witness in that case and in giving his testimony on the subject of the application which he directed to be made of the three hundred dollars committed perjury, with the intent to increase the value of a second mortgage held by the petitioner. The appellant claims that this disentitles the insolvent debtor to a discharge under V. S. 2135 which

enumerates what acts on the part of the insolvent debtor shall prevent his being granted a discharge. The perjury found by the master was not committed in the insolvency proceedings, and, therefore, does not fall within the kind of perjury mentioned in V. S. 2135. Nor was it a preference or an attempted preference of a creditor within the meaning of chap. 102. If the perjury had proved successful in accomplishing the purpose for which it was committed, it would not have affected the distribution of the insolvent debtor's estate among his creditors under the insolvency law. It was an attempt of a witness to aid one of the parties by perjury, instead of an attempt by the debtor to transfer property under his control to a creditor for the purpose of giving him a preference over other creditors.

Decree affirmed with costs to appellee, and case remanded to court of chancery.

PLIMINGTON DAGGETT *vs.* CHAMPLAIN MANUFACTURING COMPANY.

May Term, 1899.

Present: TAFT, C. J., ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed June 21, 1899.

Reversal for Improper Argument.—The question was, whether the liability was upon the defendant or upon Barnard, who was in the defendant's employ and was financially irresponsible. The trial court permitted plaintiff's counsel to argue to the jury that their verdict should be for the plaintiff because the defendant could reimburse itself out of Barnard's wages, whereas the plaintiff could not collect a judgment against him. *Held*, reversible error.

Evidence.—The question being whether the lumber for the price of which this action was brought, was purchased by Barnard, to whom it was

delivered, or by the defendant, this court cannot find error in the admission of evidence that pigeonholes in Barnard's office and a saw-frame in his shop bore posters with the words, "Property of the Champlain Mfg. Co.," to the knowledge of the defendant's superintendent; nor in the admission of evidence that the superintendent was present when the purchase was made; and although the fact that Barnard was the defendant's agent two years later would not alone have been evidence that he was its agent when the purchase was made, this court cannot say from the record before it that the evidence did not disclose such a chain of circumstances as made the fact admissible, and error is not to be presumed.

Election of Remedies.—The plaintiff is not precluded from this action by having brought a former action against Barnard for the price of the same lumber, for the plaintiff's evidence tended to prove that he sold the lumber directly to the defendant, and disclosed no state of facts which would entitle him to elect between Barnard and the defendant.

ASSUMPSIT. General issue. Trial by jury at the March term, 1897, Rutland county, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff claimed to recover for a quantity of hard-wood lumber which he claimed was sold and delivered to the defendant. His evidence tended to show that in June, 1894, McLaren, the superintendent and purchasing agent of the defendant, came to the plaintiff's house where the lumber was then stored, in company with one Barnard, who was then engaged in the manufacture of chair stock; that he bargained with said McLaren, who acted for the defendant, for the sale of all the hard-wood lumber which was there stored, and for a quantity of hard-wood lumber that was then on the mountain; that he delivered lumber at the place of business of said Barnard from time to time after said date until the following September, and for each load so delivered took a receipt showing the number of feet, signed by Barnard.

The defendant's evidence tended to show that the plaintiff sold the lumber to Barnard, and that McLaren made no contract with the plaintiff and that he went with said Barnard on said occasion for the purpose of inspecting the lumber with a view to ascertaining whether it would be

suitable to be manufactured into chair stock such as the defendant contemplated purchasing from said Barnard when manufactured.

The action against Barnard, mentioned in the opinion, had been discontinued.

Butler & Moloney for the defendant.

Joel C. Baker for the plaintiff.

THOMPSON, J. (1) This is an action to recover the price of a quantity of hard-wood lumber claimed to have been sold and delivered to the defendant by the plaintiff. The lumber was delivered to one Barnard, who, as the plaintiff claimed, was the agent of the defendant. The defendant claimed that the sale was to Barnard, and whether it was to him or to the defendant, was the controverted issue on trial. Barnard was in the employ of the defendant at the time of the trial in the county court. Counsel for the defendant, in argument in this court, admit that it appeared in evidence in the trial below, that Barnard was then insolvent. In arguing the case to the jury, counsel for plaintiff urged upon the jury that they ought to return a verdict for the plaintiff, because if they did so, the defendant was in a position where it could make such arrangements as would reimburse itself from Barnard, he being in their employ, and the defendant could then save itself harmless from loss by reason of such verdict; whereas, if a verdict were rendered the other way the plaintiff would be helpless and unable to collect anything from Barnard. Defendant's counsel protested against this line of argument and the court ruled that it might be made and it was then repeated by plaintiff's counsel; to all of which the defendant excepted.

This was in effect asking the jury to disregard the evidence, and the legal rights of the parties, and to return a verdict for the plaintiff because Barnard was insolvent, and consequently nothing could be collected from him, if he

were in fact the purchaser of the lumber, instead of the defendant. It was error to permit such argument, and a party will not be permitted to hold a verdict obtained by such unjustifiable means.

(2) This court cannot say that in view of all the evidence, which is not before us, the pasting of the poster on which were the words, "Property of the Champlain Mfg. Company," on the case of pigeon-holes in Barnard's office, and on the frame of a saw in his shop, was not a circumstance tending to show that he was acting for the defendant in the business he carried on at the time the lumber was delivered. The evidence tended to show that such posters must have been known to the defendant's superintendent, McLaren. Nor can it be said that, in view of all the evidence, the fact that McLaren was present when the lumber was purchased, was not a relevant fact as to whether the defendant was the actual purchaser. Standing alone, the fact that Barnard went to work in 1896 for the defendant, as a foreman, in one of its shops at Burlington, Vt., had no tendency to prove, that he was its agent in 1894. But this court cannot say, that the evidence did not disclose, such a chain of facts as made his employment by, and relation to, the defendant in 1896, a relevant fact in respect to his business relation to it in 1894. Error must appear affirmatively upon the record. All presumptions are in favor of the correctness of the rulings in the court below. Hence, this court cannot say it was error to permit counsel to argue, that all these facts were circumstances, tending to show a business connection between the defendant and Barnard in 1894, during the time the lumber was sold and delivered.

(3) The record does not disclose such a state of facts, as would entitle the plaintiff, at his option, to treat either the defendant or Barnard as purchaser. His evidence tended to prove that he sold the lumber directly to the defendant. Hence the fact that he brought suit against Barnard to

recover for the lumber, would not operate as such an election of debtors as would disentitle him to maintain an action against the defendant, if it were the purchaser. Consequently the defendant was not entitled to the instruction to the jury, for which it asked, which was, "that the plaintiff, by commencing a suit against Barnard to recover for the same cause of action here sought to be recovered, elected to treat Barnard as his debtor and he is bound by that election and cannot pursue an inconsistent remedy, if he had a full knowledge of the facts relating to the contract of sale at the time when he brought the suit against Barnard."

Judgment reversed and case remanded.

STATE *vs.* J. E. ELDREDGE.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed May 29, 1899.

V. S. 4568—Right of Commissioners to Restock.—When the fish and game commissioners, under V. S. 4568, have stocked a pond or stream with fish and prohibited fishing therein for three years, and the three years have elapsed, their power in respect to such waters is not exhausted, but they may restock it and again prohibit fishing therein.

Boatable Waters—Information Need not Negative Constitution, c. 2, § 40.—An information under V. S. 4568, for illegal fishing, need not allege that the waters are not boatable, nor that they are not such other waters (not private property) as the inhabitants of the State have a right to fish in by virtue of the constitution of Vermont, c. 2, § 40; for such are matters of defense, as held in *State* v. *Bevins*, 70 Vt. 574.

INFORMATION under V. S. 4568 for illegal fishing. Plea, not guilty. Trial by jury, at the December term, 1898,

Addison county, *Ross*, C. J., presiding. Judgment of guilty upon a special verdict. The respondent excepted.

The special verdict was as follows: "In this case the jury under oath find specially that the facts set up in the information are true; and they find the further fact that the identical waters were posted by the fish and game commissioners, and fishing prohibited therein for the three years prior to April 1, 1896, and ending with that date, when the posting and prohibition specified in the information was begun. If as a matter of law under these facts the defendant is guilty, the jury find him guilty, otherwise not guilty."

W. H. Bliss for the respondent.

The commissioners had not power to lap a second three year term upon the first. V. S., c. 189, expressly provides that the prohibition shall be "for a period not exceeding three years." V. S. 4568. This statute is in derogation of the common law and is not to be extended by construction.

V. S. 4567 provides, "waters stocked by the fish and game commissioners shall thereafter be treated as public waters." If this means anything, it confers upon the public, after the three years expire, the old right to fish. *N. E. Trout and Salmon Club* v. *Mather*, 68 Vt. 338; *State* v. *Theriault*, 70 Vt. 617.

The constitution, c. 2, § 40, declares that "the inhabitants of this State shall have liberty in seasonable times to hunt and fowl on the lands they hold and on other lands not enclosed; and in like manner to fish in all boatable and other waters (not private property) under proper regulations to be hereafter made and provided by the general assembly." The information is bad in failing to allege that the waters in question were not boatable waters or that they were private property. I Bishop Crim. Proc., § 637; *State* v. *Barker*, 18 Vt. 195; *State* v. *O'Donnell*, 10 R. I. 472; *Com.* v. *Kenner*, 11 B. Munroe 1; *U. S.* v. *Cook*, 17 Wall. 168; *State* v. *Stevenson*, 68 Vt. 529.

F. L. Fish, State's Attorney, for the State.

TAFT, C. J. The respondent contends that when the fish and game commissioners have stocked a pond or stream with fish, and prohibited fishing therein for three years, and the three years have elapsed, their power in respect to such stream is exhausted; that they cannot restock it and again prohibit fishing therein. Such is not the construction we give the statute. One stocking of the pond or stream may be unsuccessful, and a repetition of the experiment necessary to effect the purposes contemplated by the statute. The limitation of three years provided in the statute does not imply that fishing can never be prohibited in one stream, for a longer time, but that one experiment shall not continue beyond that period.

It is further contended that there is no allegation in the information that the waters in question were not boatable nor that they were private property, and that by the constitution, c. 2, § 40, the inhabitants of this State can fish in all boatable waters and other waters, (not private property,) and that these exceptions should be negatived in the information. That they need not be was held in *State* v. *Bevins*, 70 Vt. 574.

Judgment that there is no error in the proceedings and the respondent takes nothing by his exceptions. Execution of the sentence ordered.

Thompson, J. dissents.

THOMAS MURTEY, receiver, *vs.* SIMEON ALLEN.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and WATSON, JJ.

Opinion filed June 5, 1899.

Judicial Notice—Statutes of Other States.—This court cannot take judicial notice of the constitution or statutes of other states, nor of the interpretation thereof by the courts of the same.

Statutes—No Extra Territorial Force.—This court is not bound to enforce a specific remedy prescribed by the statute of another state.

Receiver—Confined to Common Law Remedy in Vermont.—In Vermont a foreign receiver seeking to enforce against a resident of this State a liability arising under the laws of the state of his appointment, has no remedy other or greater than exists in such cases at common law.

Plaintiff Must Have Legal Title.—It is fundamental that a party, to sue at law in his own name, must have a legal title to the thing in controversy; and no exception exists at common law in favor of a receiver.

Receiver Has not a Legal Title.—A receiver derives his authority from the court appointing him, and his possession is the possession of the court, for the benefit of those to whom the court may decide the property belongs,—the title thereto remaining unchanged.

Receiver not Entitled to Maintain Action in His own Name.—The liability under the constitutional provision upon which this action is based is for the benefit of creditors, and the declaration does not show the receiver to have such legal title as should enable him to maintain an action at law in his own name in this State for its enforcement.

DEBT. Heard on demurrer to the declaration, at the September term, 1898, Rutland county, *Thompson*, J., presiding. Demurrer sustained. The plaintiff excepted.

The declaration alleged the organization, existence and operation of the Commercial Bank of Weeping Water, in Nebraska; defendant's ownership of stock therein; the existence of the constitutional provision quoted in the opinion of the court as of the time when the defendant became a stockholder and ever since; the existence of a law of Nebraska that a court might order the receiver of a banking corporation, who had filed a certain report, to

order such receiver to proceed against the stockholders to enforce their liabilities in favor of creditors, holding whatever surplus funds might remain after paying the debts of the corporation subject to the order of the court, to be made in favor of the parties entitled thereto; the insolvency of said bank resulting from said liabilities incurred while the defendant was a stockholder; the due appointment and qualification of the plaintiff as receiver, and the order of the court to the plaintiff as such receiver to enforce against the stockholders their full additional liability under the laws and constitution referred to; by reason whereof it was alleged that an action had accrued to the plaintiff to demand and have of the defendant the par value of the stock held by him.

Butler & Moloney for the plaintiff.

The declaration is attacked by a general demurrer which goes to the substance or right of action and not the form of the declaration. V. S. 1147; *Sheridan* v. *Sheridan*, 58 Vt. 504. The demurrer admits the law of a foreign state and the facts as stated in the declaration whether stated argumentatively or directly. Actions in this State upon foreign statutes are upheld. The nature of the remedy or the jurisdiction of the courts to enforce it is not under international comity dependent upon the question whether it is a statutory or common law right. *McLeod* v. *Railroad Co.*, 58 Vt. 727; *Cady* v. *Sanford*, 53 Vt. 632. The statute declared upon has been construed by the highest court of Nebraska. *State* v. *Bank*, 70 N. W. R. 221; *Farmers' Loan & Trust Co.* v. *Funk*, 49 Neb. 353: 68 N. W. 520; *Globe Pub. Co.* v. *Bank*, 41 Neb. 175: 59 N. W. 683; *Bank* v. *Gibson*, 37 Neb. 750: 56 N. W. 616; *Bank* v. *Bank*, 74 N. W. 1086; *Fairfield* v. *Gallatin*, 100 U. S. 47.

When the subscriber took his stock he entered into a contract to assume and pay an additional amount equal to the paid up value of the stock held by him to the creditors or the receiver as their representative, in case of

an insolvent bank whose debts were created while he was a stockholder. The statute prescribed no specific remedy, so that the common law remedy by action at law is appropriate. *Dauchy* v. *Brown*, 24 Vt. 202; *Marshall* v. *Sherman*, 148 N. Y. 9; *Knowlton* v. *Ackley*, 8 Cush. 97. The receiver stands in the place of the creditors and acts as their trustee under the Nebraska statute. *Dennick* v. *Railroad Co.*, 103 U. S. 11. An assignee of choses in action who takes the assignment in a country where such choses are assignable, may maintain an action in that character in a jurisdiction where they are not assignable. *Pickering* v. *Fisk*, 6 Vt. 109. If the stockholder was only liable in proportion to the stock held by him, a resort to chancery might be necessary, but this statute makes the stockholder individually liable for the debts for an amount equal to the par value of his stock. The liability is fixed and does not depend upon the liability of other stockholders. *Handy* v. *Draper*, 89 N. Y. 334; *Bank* v. *Bliss*, 35 N. Y. 412.

When the defendant took his stock he promised in legal effect to pay to the receiver, for the benefit of creditors, an amount equal the par value of his stock, and this is a contract which may be enforced in Vermont. The plaintiff is what may be called the statutory receiver, appointed by the law of the state in which the contract was made. The property of the bank and the right to sue in behalf of the creditors vested by operation of law in the receiver. Gluck & Becker on receivers, 53, 231; *Relfe* v. *Rundle*, 103 U. S. 222; *Parsons* v. *Charter Oak Life Ins. Co.*, 31 Fed. Rep. 305; *Fry* v. *Charter Oak Life Ins. Co.*, 31 Fed. Rep. 197; *Weingartner* v. *Charter Oak Life Ins. Co.*, 32 Fed. Rep. 314; *Bockover* v. *Life Association*, 77 Va. 85; *Rundel* v. *Life Association*, 10 Fed. Rep. 720; *Davis* v. *Life Association*, 11 Fed. Rep. 781; *Buswell* v. *Iron Hall*, 161 Mass. 224.

The suit should be prosecuted in his name. Thompson on Liabilities of Stockholders, §§ 81, 340; Cook on Stockholders, § 208; *Story* v. *Furman*, 25 N. Y. 214.

F. S. Platt and *J. C. Baker* for the defendant.

WATSON, J. The plaintiff, as receiver of the Commercial Bank of Weeping Water, in the state of Nebraska, under an appointment by the district court within and for the county of Cass, in the state of Nebraska, in a proceeding in which the state of Nebraska is complainant and the said bank is defendant, has brought his action of debt against the defendant, a resident of this State, and an alleged stockholder in said bank, to enforce an alleged liability existing against him by force of § 7, of Art. 11, of the constitution of the state of Nebraska, which reads: "Every stockholder in a banking corporation or institution, shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

The first count of the declaration was waived by the plaintiff in the county court, and to the other two counts the defendant interposed a general demurrer which was sustained by the county court, and upon exceptions thereto by the plaintiff, the case is here upon the sufficiency of the declaration.

In determining the questions involved, we are confined to the averments in the declaration, and cannot take judicial notice of the constitution or statutes of the state of Nebraska, nor of their interpretation by the highest court in that state. *Hartland* v. *Windsor*, 29 Vt. 354; *Hancock National Bank* v. *Ellis*, 166 Mass. 414: 55 Am. St. Repts. 414.

Assuming the liability under the constitutional provision in question to be contractual in nature, and to be construed by the laws of Nebraska, the form of remedy, and the mode of proceeding, are regulated by the laws of the place where the action is instituted: Story on Conflict of Laws, § 556; *Harrison* v. *Edwards*, 12 Vt. 648; and if the constitution or statutes of the state of Nebraska contain provisions

prescribing a specific remedy for enforcing this liability, such provisions have no extraterritorial force and we are not affected thereby. 2 Morawetz on Corp. § 876.

The statutes of this State contain no provisions creating any new remedy at law, or enlarging or changing the common law remedy, if such exists, upon such a constitutional or statutory liability. In that regard, a receiver has no remedy at law, other than such as is given him by the common law.

It is fundamental that to authorize a party to sue at law in his own name, he must have the legal title to the matter or thing in controversy, and no exception to this rule exists, at common law, as to suits brought by a receiver. He can maintain an action at law in his own name only when he has in himself the legal title. High on Receivers, § 220; *Newell* v. *Fisher*, 24 Miss. 392; *Yearger* v. *Wallace*, 44 Pa. St. 294.

A receiver derives his authority from the court appointing him, and his possession of property and property rights, is the possession of the court for the benefit of whomsoever the same shall ultimately be adjudged to belong. The title thereto is unchanged. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 236.

The liability under the constitutional provision upon which this action is based, is for the benefit of creditors, and the allegations in the declaration do not show the receiver to have such a legal title as will enable him to maintain an action at law in his own name, in this State, for its enforcement.

Judgment affirmed.

Re Bela A. Turner.

May Term, 1899.

Present: Taft, C. J., Rowell, Munson, Start and Thompson, JJ.

Opinion filed July 10, 1899.

V. S. 1272—Deposition.—Under V. S. 1272, the deposition of a resident of Vermont may be taken here to be used in a court without this State.

V. S. 1256—Taking Deposition of Adverse Party—Motive Immaterial.—The deposition of an adverse party may be taken in the same manner as the deposition of a witness not a party, and the motive in taking it, however unworthy, is immaterial.

Deposition—Notice—Waiver by Appearance.—An appearance at the taking of a deposition, without objection for want of notice, is a waiver of any irregularity therein.

V. S. 1268.—The relator was properly committed by the notary for refusing to give his deposition.

Habeas Corpus. Heard at the May term, 1899, of the supreme court for Orange county.

David S. Conant for the relator.

Scott Sloane for the defendant.

(1) Taft, C. J. The relator, a resident of this State, was committed to jail under V. S. 1268, for refusing to give his deposition, acting by the advice of his solicitor. He claims that no cause exists for taking his deposition; that he is not within any of the six sub-divisions of V. S. 1257. Sub-division 4 provides that a deposition may be taken when the deponent "resides without this State." A notary may take a deposition, V. S. 1258. These and all provisions of law authorizing the taking of depositions to be used in the courts of this State were made in all respects equally applicable to the purposes of obtaining depositions designed for use in courts without the State, by No. 16, Acts 1859, and are now so applicable. V. S. 1272. Under these provisions a deposition of a resident of this State may

be taken within this State to be used in a court without this State.

V. S. 1256 provides that a deposition may be admitted on the trial of a civil cause, and in Re Foster, 44 Vt. 570, it was held that a party may cause the deposition of an adverse party to be taken, in the same manner as the deposition of a witness not a party, and that having a legal right to take it, whether his motive was improper or unworthy, was immaterial.

(2) It is insisted that the notice of the taking was insufficient. It was given in New Hampshire in accordance with the law of this State. It does not appear what the law of New Hampshire is in regard to the notice required for the taking of a deposition. The admissibility of the deposition undoubtedly would depend upon the law of that State. In the absence of any showing upon that point, we presume the notice was sufficient, especially as the party appeared in response to it, consented to a continuance of the case, and at the time to which the taking was continued, appeared, and at no time objected to the taking of the deposition for want of notice. His appearance without objection for that reason, waived any irregularity therein. Had objection then been made and the notice insufficient, a new notice could have been given. The notary had jurisdiction of the subject matter and the parties. The fact that the deposition might be taken before a commissioner, under V. S. 1259, does not prohibit the taking of a deposition under any other mode authorized by the statute.

The petition is dismissed and the relator remanded to his former custody.

GEORGE T. CHAFFEE, et al., *vs.* RUTLAND RAILROAD COMPANY.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed July 14, 1899.

V. S. 1148—Declaration May Be Amended even in Supreme Court—Evidence—The declaration alleged that the defendant so negligently managed its locomotive engine that fire was communicated therefrom to the plaintiffs' property, resulting in the damage sought to be recovered; but did not allege that the engine was faultily constructed or equipped, nor that the defendant had negligently allowed rubbish to accumulate upon its road-bed which aided in the spread of the fire. The defendant objected to all evidence in respect to such matters and to the charge of the court permitting a recovery upon those grounds, but the court having admitted the evidence, the case was fully tried upon both sides, as though such allegations had been made. *Held*, that the testimony was properly admitted as bearing upon the question whether the fire was communicated by the defendant's engine, and that the plaintiffs should be permitted to amend their declaration, even in the supreme court, so that the same might conform to the facts proved, and that upon the declaration as amended the judgment should be affirmed, but without costs in this court.

Amendment after Judgment.—Although none of our cases have gone to the extent of permitting an amendment after judgment, the court clearly have that power under V. S. 1148.

Amendment Will Cure Error, but not Create It.—The amendment in the present case is permitted in order that the pleadings may conform to the proof, for the purpose of sustaining the judgment, not reversing it.

CASE, for the burning of a barn and contents. Plea, general issue. Trial by jury, March term, 1898, Rutland county, *Start*, J., presiding. Verdict and judgment for the plaintiffs. The defendant excepted.

W. W. Stickney and *J. G. Sargent* for the defendant.

No rule is more firmly imbedded in the common law than this, that a party must recover, if at all, *Secundum allegata*

et probata. The gist of the defendant's liability was negligence, although the setting of the fire by railroads is in this State *prima-facie* evidence of negligence. V. S. 2926; *Cleveland* v. *Grand Trunk R. R. Co.*, 42 Vt. 449; *Railroad Co.* v. *Richardson*, 91 U. S. 454. In most jurisdictions negligence may be averred somewhat generally; but the courts seem to hold with one accord that a party cannot charge negligence in one respect and recover for negligence in another and entirely different respect. *Mayor* v. *Humphries*, 1 C. & P. 251; *Miller* v. *Railroad Co.*, 76 Iowa 318; *Pierce* v. *Railroad Co.*, 72 Mo. 414; *Railroad Co.* v. *McLain*, 148 Ind. 188.

George E. Lawrence and *Butler & Moloney* for the plaintiffs.

TAFT, C. J. This action is brought to recover damages for the destruction of the plaintiffs' property by fire communicated by the defendant's engine. It is alleged in the declaration that the defendant so carelessly, negligently and imprudently managed its engine, that the plaintiffs' property was destroyed by fire communicated therefrom. There is no allegation that the defendant's engine was not properly equipped with suitable spark arresters and ash-pans, nor that the defendant permitted dry grass, weeds etc. to accumulate on its road-bed. The defendant objected to the proof of such facts, that is, that the engine was not equipped with suitable spark arresters and ash-pans and the accumulation of dry grass and weeds on its road-bed, and also to the charge, that if such facts were established, the plaintiffs had a right to recover.

The members of the court are not agreed in respect to the case as shown by the record but concur in holding that if the declaration had contained the allegations of negligence in the construction or condition of the engine in the respects named, and in the accumulation of dry grass and weeds, there was no error in the admission of the testimony nor in

the charge of the court. The question arises whether this court will permit such an amendment to be now made after judgment. The cause was fully tried as though such allegations were in the declaration. It is expressly stated in the exceptions that both parties gave testimony pro and con upon the questions of the defective spark arrester and ash-pan, and the accumulation of dry grass and weeds. Such testimony was admissible upon the question of whether the fire was communicated to the plaintiffs' property by the defendant's engine. It is apparent from the exceptions that the questions were fully litigated. The course of the trial was the same as if the allegations had not been omitted and an amendment of the declaration will present no new issue nor require any different proof. V. S. 1148 authorizes a court at any time to permit either of the parties to amend a defect in the pleadings upon such conditions as the court prescribes. In *Bates* v. *Cilley*, 47 Vt. 1, an amendment was permitted after verdict and before judgment and also in *Kimball* v. *Ladd*, 42 Vt. 747, and see many cases therein cited. At common law the court had power to allow an amendment of the pleadings in any case until final judgment and after motion in arrest of judgment. Amendments after trial are allowed in order to conform the pleading to the facts proved.

None of our cases go to the extent of permitting an amendment after judgment but the court under the statute V. S. 1148, clearly have that power. All amendments are in the discretion of the court and are allowed or refused as the court may deem most conducive, to the furtherance of justice. An amendment is not allowed if it introduces a new cause of action. An amendment in the case before us is only permitted in order that the pleadings may conform to the proof and for the purpose of sustaining the judgment, not reversing it. 1 Ency. Pl. and Prac. 582. For as said by *Redfield*, C. J., in *Bank* v. *Downer*, 29 Vt. 332, "an amendment will cure error but cannot create it."

The plaintiffs may amend their declaration by filing an amendment alleging the defendant's negligence in the construction or condition of the spark arrester and ash-pan of its engine, and in permitting an accumulation upon its road-bed, of dry grass, weeds, bushes, etc., and when such amendment is made, the

Judgment may be affirmed, but without costs in this court.

GRACE I. PARKER *vs.* TAYLOR O. PARKER, defendant, O. H. SMITH, tr., and J. P. LAMSON, S. C. SHURTLEFF and P. G. CAMP, clts.

Argued May Term, 1898.

Present: ROSS, C. J., TAFT, START and THOMPSON, JJ.

Re-argued January Term, 1899.

Present: TAFT, C. J., ROWELL, START, THOMPSON and WATSON, J.J.

Opinion filed July 15, 1899.

V. S. 1752—Misappropriation of Trust Funds—Close Jail Execution.—The plaintiff's grandfather, shortly before his death, placed in the hands of the plaintiff's father, the defendant, the sum of five hundred dollars in notes to be paid with accumulations to the plaintiff upon her becoming of age. The defendant expended the entire amount in educating the plaintiff and in support of himself and family, claiming that such were the conditions upon which the fund was received. *Held*, that the case fell clearly within the letter and spirit of V. S. 1752, entitling the plaintiff to a close jail execution.

V. S. 1752—Right to Close Jail Execution Even Where Trustee Process Is Used.—That property was attached upon the writ and the debtor of the defendant summoned as trustee, did not affect the plaintiff's right to a close jail execution.

Trustee Process—Notice of Assignment.—To make an assignment of a chose in action effective as against trustee process, notice thereof to the

trustee must have been given, before the service of the writ, by the procurement of the assignee—mere knowledge of the assignment on the part of the trustee being insufficient—but the fact that the notice is given by such procurement need not be made known to the trustee.

Attorney's Lien.—This court adheres to *Weed* v. *Boutelle*, 56 Vt. 570, holding that an attorney has a charging lien upon a judgment for his services and disbursements in the suit in which it is recovered, which will prevail against trustee process.

GENERAL ASSUMPSIT. Trial by jury, at the September term, 1897, Washington county, *Tyler* J., presiding. Verdict and judgment for the plaintiff with a close jail certificate against the defendant. The defendant excepted. The cause was then continued as to the trustee and a commissioner appointed, upon whose report at the March term, 1898, *Munson*, J., presiding, judgment was rendered for claimants Shurtleff and Lamson and against claimant Camp, and discharging the trustee except as to the claimants first named. Claimant Camp excepted.

Upon the jury trial the plaintiff's evidence tended to show that the grandfather of the plaintiff shortly before his death placed in the hands of the defendant, the plaintiff's father, the sum of five hundred dollars in notes to be paid with accumulations to the plaintiff upon her becoming of age. The defendant's evidence tended to show that he received the notes with liberty to use the proceeds for the support of himself and family, including the plaintiff, who was then in her minority, and that he had thus expended the entire amount.

The suit was begun and continued by the trustee process and attachment of property.

Neither Lamson nor Shurtleff ever gave the court notice of their lien, nor filed any written statement in either court asserting the same.

John W. Gordon for claimant Camp, and defendant.

J. P. Lamson for plaintiff, trustee, and claimants Lamson and Shurtleff.

THOMPSON, J. (1) In *Parker* v. *Parker*, 69 Vt. 352, it was held in the case at bar, that the plaintiff could maintain an action at law to recover the trust funds in the hands of the defendant, belonging to her. No question was made in the court below as to whether the plaintiff must declare in special assumpsit, instead of declaring as she did, in the general counts in assumpsit. Hence it must be taken that the defendant's exception to granting a certified execution against him, was upon the ground that the facts before the county court were not such as to warrant the granting of such an execution, as a matter of law, and that the objection and exception was so understood by that court. V. S. 1752 provides that "in an action for the recovery of money held in a fiduciary capacity, if it appears to the court that a defendant intentionally converted said money or other property to his own use, or diverted or misapplied the same, or the use thereof, it shall adjudge that the cause of action arose from the wilful and malicious act or neglect of such defendant, and that he ought to be confined in close jail, and issue execution against his body, with a certificate thereof, stated in or upon such execution, and such execution, with such statement or indorsement, shall have the same effect as an execution issued on judgments founded upon tort, with a like statement or indorsement." There is no doubt but that the facts of the case brought it clearly within the letter and the spirit of this section of the statute. The fact that the plaintiff had attached a fund in the hands of a trustee, which was claimed to belong to the defendant, did not disentitle her to this adjudication as to a close jail execution.

(2) The claimant Camp excepted to the judgment of the county court in favor of S. C. Shurtleff, claimant for $75.75 of the fund, and in favor of J. P. Lamson, claimant for $63.00 of the fund, with costs to each against claimant Camp, and adjudging that he is not entitled to any of the fund, and that the trustee is chargeable in the sum of $426.37 less the amounts allowed Shurtleff and Lamson and less his costs.

The fund in the trustee's hands was assigned to claimant Camp by the defendant, November 1, 1894. The writ was served on the trustee, January 14, 1895. The right of Camp to the fund as against the plaintiff depends upon whether he gave notice of the assignment to him, to the trustee as required by law, prior to the service of the writ on the latter. The assignment to Camp was in writing and under seal. At the time of its execution by the defendant, there was written on the back thereof the following acceptance: "At Marshfield in said county of Washington; I hereby accept said assignment and herein agree to pay over all money to said P. G. Camp under the condition and stipulation mentioned herein described. Marshfield, Vt., November, 1894." November 29, 1894, defendant Parker, at the request of Camp, carried this assignment to the trustee and requested him to sign the acceptance written on the back thereof, which he refused to then do, saying he should want to consider the matter. The assignment was then left with the trustee, who kept it a few days, copied it and handed it back to the defendant, and again refused to sign the acceptance written thereon. This all occurred before the service of the trustee process. Notice of the transfer of a promissory note, chose in action or other claim or right, in order to protect it from attachment by trustee process in a suit against the assignor, must be given by the assignee or by his procurement. Knowledge of the assignment, on the part of the trustee is not enough, nor is notice from the assignor or a stranger, without the procurement of the assignee. *Peck* v. *Walton*, 25 Vt. 33; *Webster* v. *Moranville*, 40 Vt. 701; *Farm & Mech. Bank* v. *Drury*, 35 Vt. 469; *Barron* v. *Porter*, 44 Vt. 587. The notice in question was given the trustee by the procurement of claimant Camp, and the trustee understood it to be a notice of the assignment. It was not necessary for Parker to disclose to him that in delivering the assignment to him, he was acting as Camp's agent. Under the decisions of this

court it is clear that the notice was sufficient to protect Camp's interest from trustee process served subsequently thereto. *Brickett* v. *Nichols*, 30 Vt. 743; *Barron* v. *Porter*, 44 Vt. 587; *Holt* v. *Babcock*, 63 Vt. 634; *Enright* v. *Beaumond*, 68 Vt. 249. Hence as between the plaintiff and claimant Camp, the latter is entitled to the fund in the hands of the trustee.

Whether claimant Camp prevails against claimants Shurtleff and Lamson, depends upon whether they have an attorney's lien which attaches to the fund in the trustee's hands. This fund is the fruit of litigation in favor of defendant, Taylor O. Parker, against the estate of Sally O. Parker, deceased, of which the trustee, O. H. Smith, then was, and now is, the administrator. This litigation was ended at the September term for 1894 of Washington county court, upon a stipulation of the parties filed in that court, September 13, 1894, by virtue of which stipulation the sum of $426.37 was decreed to said Taylor O. Parker. On the day after the filing of this stipulation, Shurtleff and Lamson gave notice to the attorney of Smith, that they claimed an attorney's lien upon this fund, and he on the same day communicated this notice to Smith. Afterwards, on October 24, 1894, Lamson, acting in his own behalf and for Shurtleff, gave Smith a like notice. The amount so decreed, is the fund in the trustee's hands. It is urged by Camp, that the decree by which Taylor recovered this sum must have been rendered by the probate court, subsequent to the proceedings in the county court, and that there never was a judgment of the county court in respect to the fund, and, therefore, there was nothing in that court to which an attorney's lien could attach. As we construe the report, it finds that the decree was rendered by the county court. This also accords with the presumption that must prevail, the contrary not appearing, that the proceedings in the county court were according to the regular course of such proceedings. That court was then sitting as a probate

court in respect to that litigation, and its judgments and decrees therein would be certified to the probate court, and it would be the duty of the latter court to enroll and carry out such judgments and decrees. Shurtleff and Lamson were the attorneys of Taylor O. Parker in that litigation. There is no occasion to depart from the holding in *Weed Sewing Machine Co.* v. *Boutelle*, 56 Vt. 570, in respect to an attorney's charging lien upon a judgment for his services and disbursements in the suit in which it was recovered. Upon the facts found, Shurtleff and Lamson, have an attorney's lien for the amount of their respective bills for services rendered in that litigation, on the fund in question.

Judgment as to principal debtor is affirmed with costs. Judgment in favor of claimants Shurtleff and Lamson affirmed with costs against claimant Camp. Judgment as to claimant Camp and trustee, reversed, and judgment that claimant Camp is entitled to the fund in trustee's hands after deducting the sum of $138.75 held to belong to said Shurtleff and Lamson, and that he recover his costs of the plaintiff, except those which accrued in the litigation of the claims of Shurtleff and Lamson. Trustee discharged with costs.

McDONALD & BUCHAN *vs.* HAMILTON WEBSTER'S ESTATE.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed July 19, 1899.

Identity of Claim before Commissioners and in County Court—Evidence Tending to Support Finding.—There was evidence tending to support

the finding of the jury that the claim on which recovery was sought in the county court, though larger in amount and different in designation, was the same in substance as the claim presented to the commissioners.

Agent not a Party to Contract.—An agent who makes a contract for and in the name of his principal is not a party to the contract.

Misconduct of Counsel.—A question or misstatement of counsel, misrepresenting what a witness had just said, was at once rebuked by the court and withdrawn by the counsel; and it is held that the error, if any, was thereby cured.

Variance.—There is no variance between the proof and the declaration, although the declaration alleges that the intestate was indebted to the plaintiffs for services performed for the defendant, for although the pleading is inartificial it is easy to see that the estate is declared against for an indebtedness of the intestate's,—the defendant being not the administrator but the estate.

APPEAL from disallowance by commissioners. Declaration in general assumpsit. Trial by jury, at the September term, 1898, Washington county, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiffs sought to recover in the county court upon specifications as follows: "To building bridge $88.00, and grading $253.43, with interest from April 1st, 1893." Before commissioners they presented a claim for $30.00 only. Their evidence tended to show that the plaintiffs and the intestate prior to 1893 entered into a written contract to construct a main line side track from the yard of Charles Young so far as might be necessary to make a switch into the intestate's stoneyard; that there was an uncertainty as to how far this would be; that upon a settlement between the plaintiffs and the intestate, the latter paid to a point within twenty or thirty feet of a bridge; that the intestate then claimed this to be as far as it was necessary for him to go, but agreed that he would pay one-half the cost of the bridge and grading, amounting to $341.43, provided he used the bridge in order to make a switch into his yard; that he did subsequently find it necessary to use the bridge and grading and thereby became obligated as above; that he began to use it on or before April 1, 1893, and had intended to settle with the plaintiffs, but his last sickness

prevented; that the plaintiffs had negotiations with his administrator and talked with the commissioners upon the estate in regard to reducing their claim on condition that the bridge be no longer used to accommodate the estate, and in expectation of a compliance with this condition offered to reduce it to $30.00; that the plaintiffs' claim was the same as contained in the county court specifications, except a difference in the amount for the reason just stated; that the administrator refused to comply with the condition.

The defendant's evidence tended to show that the claim presented before the commissioners was for the rent of the bridge for a period of five years, at six dollars per year, and that before the bridge was used by Webster, the plaintiffs and Young and Webster, conveyed all of the road including the bridge to the Barre railroad.

Fred L. Laird and *Senter & Goddard* for the defendant.

John W. Gordon for the plaintiff.

ROWELL, J. One question was, whether the claim on which recovery was sought in the county court, though larger in amount and different in designation, was the same in substance as the claim presented to the commissioners, and the jury found it was. This finding is objected to, for that there was no evidence to support it. But such evidence is found in the testimony of both the plaintiff McDonald and the administrator. The testimony of McDonald, though confused and unsatisfactory, has that tendency, for he said, in substance, that he told the commissioners that the claim he presented to them was based on the original agreement with the intestate to pay towards the bridge, and this was the basis of the claim in the county court. The administrator testified in answer to a plain question in chief, that the first time he knew the plaintiffs claimed that the estate should pay half the expense of the bridge was when the claim was presented to the commissioners. And although on further examination in chief he said he did not

understand the question and answered it differently, yet it was for the jury to say whether they would accept his explanation or believe what he said in the first place, which clearly tended to support the plaintiffs' contention, as did his further testimony, when he said that the plaintiffs had repeatedly offered to settle for $30 or less if he would release any right the estate had to further use the bridge; for, as far as appears, the estate could have no such right except under the agreement of the intestate to pay half the cost of its construction if it turned out, contrary to his expectations, that he needed to use it.

Young was a competent witness, as he was not a party to the contract in issue and on trial. Nor did his testimony tend to vary the written contract concerning the building of the side track and the bridge, as claimed, but only to show an independent contract subsequently made.

Stanyan was a competent witness, for an agent who makes a contract for and in the name of his principal, is not a party to that contract.

The question or statement of counsel, whichever it is, misrepresenting what a witness had just said, was at once rebuked by the court and withdrawn by the counsel. This caused the error if any there was.

The objection that the case is within the Statute of Frauds, as the testimony tended to show a contract for more than forty dollars, is not tenable, for here was no sale of goods, wares, nor merchandise. Nor is it before us whether the case is within the statute because the contract concerns an interest in land, for the exceptions do not raise that question.

A variance between the proof and the declaration is claimed, for that the proof showed a contract with the intestate, whereas the defendant is declared against, and it is said that the administrator is the defendant, and that therefore he is declared against for the debt of the intestate. But the administrator is not the defendant, but the estate.

The declaration alleges that the intestate was indebted to the plaintiffs in such a sum for such and such things, done and performed, paid out and expended, etc., for the defendant, etc. This, though inartificial pleading, saves a variance, which means a material difference, for it is easy to see that the estate is declared against for an indebtedness of the intestate's.

Judgment affirmed and to be certified.

WILLIAM B. McELROY, admr., *vs.* RODERICK McLEAY.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed July 19, 1899.

Statement.—When Batchelder deeded the four-tenement house to the intestate, there were four water-closets in the same, which discharged into a drain running across the lot on which the house stood; thence across a lot owned by H. A. Phelps; thence across a lot called the Sullivan lot, owned by Batchelder and Phelps in common; and thence connecting with a public sewer on Church street. Soon after Batchelder sold to the intestate, he bought Phelps's interest in the Sullivan lot, and it afterwards came through intermediate conveyance to the defendant. The closets were and are a necessary part of the house; and sewer connection with Church street was and is necessary, and will continue to be as long as the closets remain in the cellar; and at the time of the conveyance to the intestate, said connection was a necessary continuous and an apparent appurtenance to the property.

V. S. 1237—Witness Incompetent.—As the effect of Batchelder's deed to the intestate is the thing in dispute, he was incompetent by V. S. 1237 to testify what the intestate was informed and knew when the deed was given, about the character of the right to drain across the Sullivan lot.

V. S. 1238—Witness Incompetent.—As the orator is an administrator and Batchelder incompetent, the defendant was also incompetent by V. S. 1238 as to facts and circumstances which took place before the death of the intestate.

Appurtenances—What Passes as Part of the Grant.—Without saying whether that part of the drain on the Sullivan lot was legally appurtenant to the property in the hands of Batchelder so as to pass under the *cum pertinentiis* clause in his deed of warranty to the intestate, the case comes within the rule that everything apparent and continuous that is essential to the beneficial use and enjoyment of the property designated in the grant is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the grant as far as the grantor had power to grant it.

Tenants in Common—Estoppel Fed by subsequently acquired Title.—The rule is not affected by the fact that Batchelder was only half owner of that part of the drain in question, for although a tenant in common cannot by his sole deed convey to a stranger an interest in a part only of the common property, yet as between the parties thereto such a deed is not void, but, if a warranty, is operative as against the grantor by way of estoppel, whether it conveys an interest in the land or not, and in the present case the estoppel is fed by the title which Batchelder afterwards acquired from his co-tenant.

License—Merger in Fee.—Even if the drain on the Sullivan lot was constructed under a license, that license became merged in the fee when the licensor conveyed to the licensees, as there was no beneficial interest to be subserved by non-merger.

Shurtleff and Wife v. *Hubbard*, Washington county, 1890, unreported, stated and approved.

Opinion Evidence.—It will not be taken that evidence upon which a fact is found by the master was opinion evidence, unless it is so shown by the record.

Appurtenance—Necessity.—The necessity of the appurtenance is to be determined as of the time of the conveyance without regard to subsequent alterations.

CHANCERY. Heard upon pleadings, master's report and exceptions thereto by both parties, at the March term, 1899, Washington county, before *Thompson*, Chancellor, who, *pro. forma*, overruled the exceptions and dismissed the bill with costs. The orator appealed.

John W. Gordon and *Senter & Goddard* for the orator.

Richard A. Hoar and *George W. Wing* for the defendant.

ROWELL, J. When Batchelder deeded the four-tenement house to the intestate, there were four water-closets in the cellar, which discharged into a drain running westerly across the lot on which the house stood; thence across a

corner of a lot owned by H. A. Phelps, where a drain connected with it from a three-tenement house on that lot; thence across a lot called the Sullivan lot, owned by Batchelder and Phelps in common; and thence connecting with a public sewer on Church street. Soon after Batchelder sold to the intestate, he bought Phelps's interest in the Sullivan lot, and thus became sole owner of it. He afterwards sold it to Beckley, who sold it to the defendant. Said water-closets were and are a necessary part of the house; and sewer connection with Church street was and is necessary, and will continue to be as long as the water-closets remain in the celler; and at the time of the conveyance to the intestate, said connection was a necessary, continuous, and an apparent appurtenance to the property.

As the effect of Batchelder's deed to the intestate is the thing in dispute, he was incompetent by statute to testify what the intestate was informed and knew when the deed was given, about the character of the right to drain across the Sullivan lot; and as the orator is an administrator and Batchelder incompetent, the defendant was also incompetent by statute as to facts and circumstances that took place before the death of the intestate. The deed, therefore, which is a warranty with a *cum pertinentiis*, without special mention of the drain through the Sullivan lot, must be considered without reference to the finding of what the intestate was informed and knew about the character of the right to drain across that lot; and the question is, whether the deed is to be given any and what effect in respect of that part of the drain.

We do not undertake to say whether that part was legally appurtenant to the property in the hands of Batchelder so that it passed as an appurtenance, as it clearly would if it was legally appurtenant; but we class the case as coming within the rule that everything apparent and continuous that is essential to the beneficial use and enjoyment of the property disignated in the grant, is, in the

absence of language indicating a different intention on the part of the grantor, to be considered as passing by the grant as far as the grantor had power to grant it. Such things pass as a part of the thing granted and by force of the grant itself, without the words, *cum pertinentiis*, or any like words. Thus, by the grant of a messuage or house, the orchard, garden, and curtilage pass; and so an acre or more may pass by the name house. Co. Litt. 5b. If a man grant *omnes boscos suos*, the land itself passes. Co. Litt. 4b. So the grant of a mill carries the use of the water by which it is worked, the flood-gates, dam, and all things necessary for its use, as well as the land on which it stands and that over which it projects. And it may embrace adjoining land, if necessary for its use and actually used therewith. In such case the adjoining land does not pass as appurtenant to, but as parcel of, the principal thing granted. 2 Wash. Real Prop. 2d ed. 663. Indeed, as said by Judge Story in *United States* v. *Appleton*, 1 Sumner 502, "every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for; and whatever are properly incidents and appurtenances of the thing granted will pass by mere operation of law, without the word *appurtenances*." And in this he agrees with Lord Coke, who says that by the grant of a manor without saying *cum pertinentiis*, the villein regardant, advowson appendant, and the like, do pass. Co. Litt. 307a.

In *Toothe* v. *Bryce*, 50 N. J. Eq. 589, it is said that the grantee is entitled to enjoy the thing granted as it was when he bought it, with all its apparent appurtenances, if they look permanent and are useful and add to its value. So in *Pyer* v. *Carter*, 1 H. & N. 916, it is said to be according to reason that when the owner of adjoining houses sells one of them, it should in the hands of the purchaser be entitled to the benefit of all the drains therefrom and subject to all the drains then necessarily used for the enjoyment of the adjoining house, without express reservation or grant,

inasmuch as the purchaser buys it just as it stands; that if this were not so, the inconveniences and nuisances in towns would be very great, for when the owner of several adjoining houses conveys them separately, it would enable the purchaser of any one of them to stop up the system of drainage made for the benefit and convenience of all. Mr. Devlin says it is strictly a question of what passes by the deed; that the law gives a reasonable intendment to the grant in all such cases, and passes with the land all the easements and privileges that belong to it and are used as appurtenances. Devlin on Deeds, sec. 863.

Coolidge v. *Hager*, 43 Vt. 9, is a good case on this subject. That was a conveyance of a house and lot without mention of a spring owned by the grantor on the land of another, from which water was then running to said house through an aqueduct that was partly in the land conveyed, partly in other adjoining land of the grantor's, and partly in the land of the other man. No question was made nor could be but that the grant carried all of the aqueduct that was in the land conveyed, and it was held that it carried the water as it was then running, with a right to the spring and the aqueduct sufficient for its continuance, as an appurtenance of the house and the land; and this was based, not on the words, *cum pertinentiis*, but on the rule above stated. Now as to Batchelder's deed, it is clear that it passed the part of the drain that was in the land conveyed. But that part was of no use without the rest. Therefore it is reasonable to suppose, as there is nothing in the deed to the contrary, that Batchelder intended to have it convey, as far as he could make it, enough of the rest of the drain to make that part beneficially useful for the purpose to which it was devoted and for which it was then being used. The only difference between this case and *Coolidge* v. *Hager* lies in the fact that there the defendant was sole owner of the spring, while here Batchelder was only half owner of that part of the drain in question. But that difference is not material on

the construction of the deed, as shown by *Charleston, etc., R. R. Co.* v. *Leech*, 33 So. Car. 175 : 26 Am. St. Rep. 667. There a tenant in common granted a right of way for a railroad over the common property. It was essential to the beneficial use and enjoyment of the right that the undivided interest of the grantor should be severed from that of her co-tenants, that the grantee might know whether any and how much of its road ran over the land of others and how much over the land of the grantor, and this could be ascertained only by a partition, which the grantor had the means of enforcing; and under the rule above stated, inasmuch as partition was essential to the beneficial use of the right of way, it was held to be clear that partition was in the minds of the parties when the grant was made, as there was no language in it indicating a different intention on the part of the grantor, and partition was ordered.

But it is said that the case does not come within the rule stated, because the drain was originally laid through the Sullivan lot by Batchelder, H. A. Phelps and N. D. Phelps, by oral license from Sullivan, when they owned the testator's premises in common, and that the owners of those premises never had any right to maintain the drain through the Sullivan lot except what was conferred by that license, which was revocable at any time on the facts found; but if not, that it certainly spent itself when the drain became worn out, as it has, and that therefore no right to renew it exists. It is further said that if this is not so, inasmuch as Batchelder was only a tenant in common of the Sullivan lot when he deeded to the intestate, he had no power to convey an interest in the drain across that lot by his sole deed, so that an essential element of that rule is wanting, namely, the power to convey, and that therefore the case is not within the rule.

As to the license, that, at its best, merged in the fee when the licensor conveyed to the licensees, as there was no beneficial interest to be subserved by non-merger.

As to the deed, although a tenant in common cannot by his sole deed convey to a stranger an interest in a part only of the common property, yet, as between the parties thereto, such a deed is not void. It is inoperative as to the co-tenant, because he is entitled on partition to have his purparty assigned in an entire parcel according to his aliquot part, and his co-tenant cannot defeat that right without his consent. But if a warranty, it is operative against the grantor as between the parties thereto by way of estoppel, whether it conveys an interest in the land or not, for, as Lord Mansfield has somewhere said, "no man shall be allowed to dispute his solemn deed." *Varnum* v. *Abbot*, 12 Mass. 474, is a leading case on this subject, and holds precisely that. And such is the doctrine of the cases generally. But we think they go further, especially the more recent ones, and hold that an interest passes as against the grantor, and that for that reason the deed is good as to everybody but the co-tenant and those claiming under him. And this is what is said in *Dall* v. *Brown*, 5 Cush. 289. So in *Gibbs* v. *Swift*, 12 Cush. at page 398, it is said that if the co-tenant takes his share out of other parts of the common property, or is otherwise satisfied, or is not in condition to take the exception, then the purchaser taking from his grantor by metes and bounds will take a title that cannot be disputed. In *Whitton* v. *Whitton*, 38 N. H. 127, 75 Am. Dec. 163, it is said that though the deed is inoperative as far as it impairs the rights of the co-tenant, yet as to him and all others, for all other purposes, it is good, and the grantee is to be regarded as owner. So in *Young* v. *Edwards*, 33 So. Car. 404: 26 Am. St. Rep. 689, it is said that though such a conveyance will not be allowed to operate to the prejudice of the co-tenant, yet when it can be given effect without such prejudice, there is no reason why it should not be sustained, and that such is the weight of authority. Mr. Freeman thinks that such a deed conveys an interest as between the parties. Cotenancy and Partition, 2d ed. § 206.

But if this were not so, it would make no difference in this case, for when Batchelder bought out his co-tenant, and thus became the sole owner of the Sullivan lot, that interest, when it accrued, fed the estoppel, and what before was an estate by estoppel only, became an estate in interest, and of the same quality as though Batchelder had been sole owner when he gave the deed. And although the defendant be regarded as a *bona-fide* purchaser without notice, it would make no difference, for when an estoppel works on the interest, it runs with the land into the hands of whomsoever it comes, and this, notwithstanding our registry system. *Jarvis* v. *Aikens*, 25 Vt. 635, is full authority on this point. In *Cunningham* v. *Pattee*, 99 Mass., at page 251, it is said that "if the title of the co-tenant entitled to disaffirm the conveyance becomes vested in the one by whom it was executed, the newly acquired title of the grantor will inure by estoppel to the benefit of the grantee." Mr. Freeman says that all the authorities on the subject seem to be to the same effect; sec. 207. But this is too much to say, for although the great weight of authority is that way, yet cases are not wanting that deny the doctrine. And Mr. Bigelow, Mr. Rawle, and the American editors of Smith's Lead. Cases, treat the subject fully and at large, and also deny the doctrine, and with very cogent reasoning. But that has been the law of this State for fifty years, if not always; and as it is a rule of property, we should not feel at liberty to depart from it, even though we thought it unsound.

Shurtleff and wife v. *Hubbard*, in Washington county, decided by this court in 1890, but not reported, is relied upon by the orator. There one Keith, being owner in severalty of the orators' premises, took water thereto for the beneficial use of the house and barn, by means of a branch pipe attached to a main aqueduct leading from springs on other land whereof, and of said aqueduct, he owned a part as tenant in common. The title of the

premises afterwards passed from him by the foreclosure of a mortgage that he gave thereon after the water was thus put in, and came to the orators from the mortgagee. After the execution of the mortgage and before its foreclosure, the defendant became the owner of an undivided half of said springs and aqueduct, which half included Keith's share; and after the orators bought, he became owner of the other half, and then disturbed them in the use of the water, whereupon they brought a bill to restrain him, which was sustained. The case fell to the late Chief Judge Royce, who wrote no opinion, and none of the other judges who sat in the case recall the ground on which it was put; but the decision was manifestly right, as Keith's mortgage, which contained full covenants, was good against him by way of estoppel, even though no interest in the water passed thereby, and all the more good against him if an interest therein did pass, and good against the defendant in either case, especially as the record does not show that he claimed to stand as a *bona-fide* purchaser without notice.

As the finding that at the time of the conveyance to the intestate the sewer connection with Church street was a necessary, continuous, and an apparent appurtenance is based partly on the testimony of H. A. Phelps, it is objected that his testimony was not admissible, for that it consisted merely of his opinion that such was the fact. But as the record does not show that such was his testimony, the objection is not considered.

It is further objected that sewer connection with Church street was not necessary, as it is found that connection could have been made with the sewer on Park street at an expense inside the house of about seventy-five dollars. But, as said in *Pyer* v. *Carter*, above cited, it is the necessity at the time of the conveyance, and as things then were, without alteration, that is to govern.

Reversed and remanded, with mandate.

STATE *vs.* CHARLES S. HUBBARD.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed June 5, 1899.

Information Amended by Insertion of Date.—An information charging the respondent with owning, keeping and possessing intoxicating liquor with intent to sell, furnish and give away the same without authority of law, in which the time of committing the offence is alleged as "on the day of A. D. 1898," may be amended by inserting the date relied upon.

Information May Be Amended even in Substance.—It is no objection that the allowance of the amendment is in effect making a new information, for even at common law informations are amendable in substance, even to the striking out or the addition of counts.

INFORMATION. Trial by jury, at the September term, 1898, Washington county, *Start*, J., presiding. Verdict, guilty. The respondent excepted.

John G. Wing for the respondent.

The court, so far as informations are concerned, having held that the same may be amended in substance notwithstanding V. S. 4542, should be confined to common law rules in determining the right to amend; and V. S. 1911 does not apply.

Richard A. Hoar, State's Attorney, for the State.

WATSON, J. An information was filed against the respondent charging him with owning, keeping, and possessing intoxicating liquor with intent to sell, furnish, and give away the same, without authority of law, in which the time of committing the offense was alleged as "on the day of A. D. 1898." Upon motion of the State, the court allowed the information to be amended by inserting,

in said blank spaces, the date, claimed to be that of the alleged owning, keeping, etc., to which respondent excepted.

It is contended on behalf of the respondent that the allowance of this amendment was, in effect, making a new information and therefore improper.

Assuming the respondent's contentions, as to the effect of this amendment, to be sound, it can avail him nothing, for, at common law, informations were amendable in substance, even to the striking out or the addition of new counts. *State* v. *White*, 64 Vt. 372.

Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions. Let sentence be imposed and execution done.

C. P. TARBELL, proponent, *vs.* A. E. WALTON, contestant.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed July 19, 1899.

Allowance and Record of Foreign Will.—V. S. 2366, 2368, permitting the allowance in this State of a will proved and allowed in any other of the United States or in a foreign state or country, were not intended to apply to a foreign probate of the will of a testator domiciled here, but only to such probate of the will of a testator domiciled in some other state or country, who leaves property here on which his will can operate.

V. S. 2365—Foreign Will.—V. S. 2365 providing that a will made out of the State, which might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed and recorded in this State, refers to proof here in the ordinary way and not to proof by authenticated copy of a foreign probate.

Walton v. *Hall's Estate*, 66 Vt. 455, correctly held that the fact that there was property in Illinois on which the will could operate, conferred

jurisdiction; and that the probate of the will in Illinois made the will effective against everybody to pass all the property there situate; but such probate established nothing beyond the validity of the will there. If *Ives* v. *Salisbury*, 56 Vt. 565, is in conflict herewith it is overruled.

APPEAL from probate. Trial by court, at the June term, 1898, Orange county, *Start*, J., presiding. Upon the findings, the court affirmed the decree of the probate court allowing, filing and recording the instrument. The contestant excepted.

J. W. Gordon and *R. M. Harvey* for the contestant.

Darling & Darling and *Tarbell & Whitham* for the plaintiff.

ROWELL, J. John Walton, being domiciled in Tunbridge, in the District of Randolph, in this State, died there, leaving a will made in Illinois when he was domiciled there. The will was probated in Illinois, where the testator left real estate on which it could operate, and a copy of it, and of the probate thereof—which, for present purposes, we treat as duly authenticated—was produced to the probate court of said district, which adjudged that said instrument ought to be allowed in this State, and thereupon filed and recorded said copy; and the question is, whether the will can be proved here in that way, or whether it must be proved *de novo*. This depends upon the construction to be given to our statute, which provides that wills proved and allowed in any other of the United States, or in any foreign state or country, according to the laws of such state or country, may be allowed, filed, and recorded in the probate court of a district in which the testator has real or personal estate on which such will may operate, and shall have the same effect as if originally proved and allowed in the same court. V. S. 2366, 2368.

The fact that the statute gives jurisdiction only to the probate court of a district in which the testator has property on which the will can operate, strongly indicates

that it was not intended to apply to the foreign probate of the will of a testator domiciled here, for § 2326 provides that the will of such a testator shall be proved in the probate court of the district in which he resided at the time of his death, regardless of whether he has property there or not. A construction that would antagonize these provisions will not be adopted if it can be avoided. But § 2369 puts the matter at rest, we think. It provides that when a will is allowed on the strength of a foreign probate, the testator's estate in this State shall be disposed of according to the will as far as it operates upon it, and that the residue shall be disposed of as is provided by law in cases of estate in this State belonging to persons who are inhabitants of another state or country. Now if the provision for allowing wills on foreign probate was intended to apply to the will of a testator domiciled here, proved abroad for ancillary purposes, it is impossible to suppose that such a provision for the disposition of the residue would have been inserted, for it would be strange to say that in such a case the residue of the estate of the testator shall be disposed of as though he was not a resident, but an inhabitant of another state or country.

It is manifest, therefore, from the statute itself, that the provision in question was not intended to apply to a foreign probate of the will of a domiciled testator, but only to such probate of the will of a testator domiciled in some other state or country who leaves property here on which his will can operate, in which case it can be allowed here under this provision, and ancillary administration obtained.

The proponent invokes another provision, which enacts that a will made out of the State that might be proved and allowed by the laws of the state or country in which it was made, may be proved, allowed, and recorded in this State, and shall then have the same effect as if executed according to the laws of this State. But this means that such wills may be proved here in the ordinary way, and has no

reference to proof by authenticated copy of a foreign probate.

The contestant claims that the courts of Illinois had no jurisdiction to probate this will, and somewhat criticises *Walton* v. *Hall's Est.*, 66 Vt. 455, in which we held that they had such jurisdiction, and gave effect to that probate as to the property in that state; and we have no doubt of the correctness of that decision. The fact that there was property there on which the will could operate, conferred jurisdiction; and that probate is conclusive as far as that State is concerned, and made the will effective against everybody to pass all the property there situate that could be transferred by a valid instrument of that kind. But no greater effect can be given out of Illinois to that probate, for it establishes nothing beyond the validity of the will there; and full faith and credit is given to it when it is permitted to make the will effective to pass the property in that jurisdiction, as we held in that case. *Robertson* v. *Pickrell*, 109 U. S. 608.

If *Ives* v. *Salisbury*, 56 Vt. 565, is in conflict with this decision, it is overruled.

Statutes in many of the states similar to ours, are similarly construed. *Stark* v. *Parker*, 56 N. H. 481; *Manuel* v. *Manuel*, 13 Ohio St. 458; *Sturdivant* v. *Neill*, 27 Miss. 157; *Wallace* v. *Wallace*, 3 N. J. Eq. 616; note to *Bowen* v. *Johnson*, 73 Am. Dec. 56.

Judgment reversed, and judgment that said instrument ought not to be allowed in this State as the last will and testament of the deceased on the strength of said foreign probate thereof. Let the contestant recover her costs, and the usual certificate go down.

ANTOINE GREGOIR *vs.* EUGENE LEONARD.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 20, 1899.

Case, When the Proper Remedy.—The defendant had a right of way over the premises of the plaintiff upon condition that he should close and put up the gates and bars after passing. The declaration alleged that the defendant passing along the right of way threw down, broke and ruined the bars in a careless and wrongful manner, and left them down so that the plaintiff's horses and cattle escaped through the open barways and destroyed his crops. *Held*, that trespass on the case and not trespass was the proper remedy.

Case, When the Proper Remedy—The Rule.—For the careless and negligent exercise of a lawful right and for the omission of an act which it is the duty of the defendant to perform, resulting in collateral injury to another who is entitled to insist upon the proper exercise of such right or upon the performance of the act omitted, the injured party may recover in an action on the case.

CASE. Heard on general demurrer to the declaration, at the December term, 1898, Addison county, *Ross*, C. J., presiding. Demurrer overruled and declaration adjudged sufficient. The defendant excepted.

W. H. Bliss for the defendant.

No brief for the plaintiff was filed with the reporter.

WATSON, J. The only contention made by the defendant upon his general demurrer to the declaration is that if the plaintiff has any right of action in the premises, it is in trespass and not in an action on the case.

The allegations in the declaration show a right in the defendant, his servants, and agents, to pass and repass to and from the lands owned and occupied by the defendant, over the described premises of the plaintiff, in and over the

way in question, upon the condition that in so passing over the plaintiff's premises they should keep the gates, bars, and fences, which they shall pass or repass, closed and put up in as good condition as they found them at the time of such passing.

The plaintiff alleges in substance, that at the time in question, he had constructed and maintained good and sufficient bars across the discontinued road near the southerly boundary of his farm, and also about thirty rods south of the north end of the discontinued road on his farm, and that the bars were then in good repair; that it was the duty of the defendant, his servants, and agents, upon passing along the road, in accordance with the conditions of the right of way, "to carefully lower said bars, without injury to them, and to place them up, after passing through;" that to obstruct the plaintiff in the use and enjoyment of his farm, on the days in question, the defendant, with his servants and agents, passed over the discontinued road, along the right of way, and through the bars, and threw them down in a careless and wrongful manner, and broke and ruined them, and, with his servants and agents, passed through and left the bars down and did not put them up, or place any barrier to prevent horses and cattle and other stock from going through the bars and upon the land of the plaintiff; and that cattle and horses did escape through them and upon his farm, trod down grass and grain growing thereon, etc., by means whereof, the plaintiff was damaged in the use and enjoyment of his farm, etc.

The plaintiff was the servient and the defendant the dominant owner of the land covered by the right of way, with a right in the defendant to enter upon and pass over the plaintiff's premises in and over the right of way, and, in so doing, the defendant had a right to take down the bars across the way to enable him to pass through.

The defendant, having the right to enter upon and pass

over the plaintiff's premises in the legitimate use of his easement, in the exercising of that right within its limitations he was not guilty of breaking and entering, and whatsoever was done thereafter being but aggravation of damages, the action of trespass on the freehold will not lie. *Goodrich* v. *Judevine*, 40 Vt. 190; *Grout* v. *Knapp*, 40 Vt. 163; *Howard* v. *Black*, 42 Vt. 258.

The throwing down of the bars by the defendant, his servants, and agents, in a careless and wrongful manner, did not work a forfeiture of the defendant's right in the easement; it was but the careless and negligent exercise of a lawful right, for which trespass will not lie. *Sabin* v. *Vermont Central Railroad Co.*, 25 Vt. 363.

The bars having been let down by the defendant, to pass through, it was his duty, after passing through, to put them up, but his failure so to do, was only the omission of an act which he ought to have performed—a mere *non-feasance*—for which trespass will not lie. *Stone* v. *Knapp*, 29 Vt. 501; *Stoughton* v. *Mott*, 25 Vt. 668; 1 Chit. Pl. 126.

The injuries for which the plaintiff seeks to recover damages, were committed by cattle and horses, which escaped through the bars, left down by the defendant, upon the plaintiff's farm, treading down grass, grain, etc., there growing. Such injuries were not done by the act of throwing down the bars in a careless and wrongful manner, and therefore immediate, but arose after that act was completed, and were more particularly occasioned by the failure of the defendant to put up the bars, after passing through, and were the collateral consequences thereof.

For the careless and negligent exercise of a lawful right and for the omission of an act which it is the duty of a party to perform, resulting in a collateral injury to another, whose relations thereto are such that he may insist upon the proper exercise of such lawful right, and upon the performance of the act omitted, but which ought to have been performed, the party so injured may recover his

consequential damages in an action on the case. That is the proper remedy. 1 Chit. Pl. 133; *Sabin* v. *Vermont Central Railroad Co.*, 25 Vt. 363. No question having been raised, in argument, as to the sufficiency of the declaration if an action on the case is the proper remedy, we express no opinion thereon.

Judgment affirmed and cause remanded.

COLTON & MORE *vs.* THE CITY OF MONTPELIER.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed July 21, 1899.

Constitutional Law—Power of Taxation.—V. S. 365, exempting certain manufacturing establishments from taxation for a term of years if the town so votes, is not in contravention of c. 1, Art. 9 of the constitution of Vermont, declaring that "no part of any person's property can be justly taken from him or applied to public uses without his own consent or that of the representative body of the freemen," and that the people are not "bound by any law but such as they have in like manner assented to for their common good."

Delegation of Legislative Power.—Such section is not a delegation of legislative power, but a permission to the town to avail itself of the privileges of the statute.

Taxation—Delegation of Legislative Power.—Moreover if it were a delegation of the power to tax, which includes the power to exempt, such delegation is legal when not prohibited by the constitution; and it is not prohibited by the constitution of Vermont.

Exemption Applies to Rented Property.—The primary object of V. S. 365 is not to aid private persons, but to benefit the public by increasing the resources of the State and its taxable property through the establishment of new industries. Hence, it is no objection that the building and machinery in question were occupied and used by tenants and not by the plaintiffs themselves.

ASSUMPSIT. Plea, general issue. Upon an agreed statement of facts, at the March term, 1899, Washington county, *Thompson*, J., presiding, a *pro-forma* judgment was rendered for the defendant. The plaintiff excepted.

Edward H. Deavitt for the plaintiff.

Fred P. Carleton for the defendant.

THOMPSON, J. Plaintiffs' property in question was exempted from taxation for five years by vote of the defendant at a meeting legally warned. This vote was taken under V. S. 365. The defendant contends that this statute is unconstitutional, because it is a delegation by the legislature of its authority to tax or exempt from taxation, and because it is in violation of the letter and spirit of Art. 9 of the bill of rights. If void for either of these reasons, the vote of the defendant is also without effect.

Unless prohibited by constitutional restrictions, the legislature may confer the taxing power upon municipalities in such measure as its deems expedient, to the same extent as the State possesses it. 2 Dil. Municipal Corp. (3rd ed.) § 740. The power to tax includes the power to exempt, unless specially prohibited by the constitution. The right is supposed to be exercised on reasons of state policy, and presumptively such exemptions contribute to the general public benefit. Cool. Taxation, 145. If the State can confer the power to tax, it can confer the power to exempt from taxation, to the same extent to which it may exercise that power. Hence, if V. S. 365 were construed as a delegation of the power therein named, to the municipality, it would not be unconstitutional, as such delegation is not prohibited by the constitution of Vermont. But it is not necessary that a legislative act should take effect at the time it leaves the hands of the legislative department, in order to have it complete, affirmative legislation. Its operation may be made to depend upon some subsequent event, and yet it may have passed through all the consti-

tutional formalities necessary to perfected legislation. Cool. Cons. Lim. (4th ed.) 142. *Bancroft* v. *Dumas*, 21 Vt. 456; *State* v. *Parker*, 26 Vt. 357. Such a statute is V. S. 365. It is left for the town or city to say whether it will avail itself of the privilege conferred by the law to encourage manufactures or not. When it legally votes to exempt for a stated time, from taxation, property enumerated in that section, it thereby brings such property within the scope of the law, but it neither adds to nor takes from the statute, by such vote. In *Richardson* v. *City of St. Albans*, heard and decided at the January term, 1899, and to be reported in the 72 Vt., it was claimed that property exempted from taxation by a vote of the city of St. Albans, under § 365, was not exempted by the laws of this State. It was held that whether the exemption was by the act of the legislature, or by the vote of the body to which it had delegated its authority in that behalf, nevertheless the exemption was by virtue of the law of the State. This was in effect a holding that whichever of the views under discussion was adopted, the section is constitutional. A further examination of the authorities confirms that view.

The general right to make exemptions is involved in the right to apportion taxes, and must be understood to exist n the supreme legislative power, unless expressly forbidden. Cool. Taxation, 145; 1 Dest. Tax. 124. Art. 9 of the bill of rights does not abridge this power. It has never been construed to abridge the power of the legislature on this subject. On the contrary, throughout the entire legislative history of this State, the power of the legislature to declare what property should be exempt from taxation, has been recognized and exercised. Thus a practical interpretation has been given to Art. 9, contrary to that for which the defendant contends. An interpretation of the constitution and bill of rights, contemporaneous with their adoption, practiced and acquiesced in for such a length of time as conclusively fixes their construction has a judicial deter-

mination to the same effect. *Stuart* v. *Laird*, 1 Cranch 299; *Martin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264; *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299; *Pollock* v. *Bridgport Steamboat Co.*, 114 U. S. 411; Cool. Con. Lim. (4th ed.) 81-86; *Huntington* v. *Bishop*, 5 Vt. 186; *State* v. *Keyes*, 8 Vt. 57; *State* v. *Bosworth*, 13 Vt. 402; *State* v. *Haley*, 52 Vt. 476; *State* v. *Magoon*, 61 Vt. 45; *Hall* v. *Armstrong*, 65 Vt. 421; *Boyden* v. *Brookline*, 8 Vt. 284; *Rogers* v. *Goodwin*, 2 Mass. 475; *Packard* v. *Richardson*, 17 Mass. 122. It is, therefore, apparent that V. S. 365 is not unconstitutional for either of the reasons urged by the defendant.

The building and machinery of the plaintiffs exempted by the vote of the defendant, are of the kind and value which may be exempted from taxation for a term of years, under the provisions of § 365. The plaintiffs have never used and operated this property themselves for manufacturing, but they erected the building and furnished the machinery, to have the same used for that purpose, and the same has been so used by their tenants during the time in question. The defendant contends that the building and machinery in question are not within the provisions of § 365, because they were not built and furnished to be used and operated by the plaintiffs, themselves, for manufacturing, and because the same have not been so used and operated by them. There is nothing in the expressed terms of § 365 which limits the power to exempt a manufacturing establishment, machinery, appliances and buildings necessary for the prosecution of the business, to such property as is actually used and operated by the owner thereof for manufacturing, during the time of the specified exemption. The primary object of this statute is not to aid and benefit private persons for private ends, but its purpose is to benefit the public at large by increasing in the end, the resources of the State and its taxable property, through the establishment of new industries. This end is as effectually attained by the

erection of such establishments and buildings and the furnishing of such machinery and appliances, to be used and operated by tenants, as would be the case were the same used and operated for a like purpose by the owner thereof. Without the opportunity to rent such plants, it is apparent that persons with capital sufficient to carry on a successful business therein, but unable financially to erect such plants, would be deterred from engaging in manufacturing, while with an opportunity to rent, they would develop new industries. On the other hand, it is conceivable that capitalists might take the risk of building a manufacturing plant if they could rent the same and have the benefit of the exemption for a time, when they would not make the investment were they compelled to operate it themselves in order to have the benefit of such exemption. The object the legislature sought to promote by this statute was the development of new industries of the character specified in § 365, by exempting the property therein specified. This purpose will be effectuated by so construing it as to include property of the character of the property in question. To hold otherwise would defeat the clearly expressed intent and purpose of the legislature. We therefore hold that the plaintiffs' property comes clearly within the letter and the spirit of the property which may be exempted from taxation under § 365.

The pro-forma judgment is reversed, and judgment for the plaintiffs to recover thirty-six dollars and interest thereon from September 29, 1898, and their costs.

SUSAN B. SOWLES *vs.* THE VILLAGE OF ST. ALBANS.

May Term, 1899.

Present: TAFT, C. J., MUNSON, THOMPSON and WATSON, JJ.

Opinion filed July 21, 1899.

Commissioner's Report — Presumption that County Court Inferred Necessary Facts.—It is unnecessary to decide whether the petitioner is estopped from denying that she is the owner of the land by the allegation in her petition that she is the owner, for the county court may have inferred that fact from the allegation and the commissioners' report, and it will be presumed in order to sustain the judgment that such inference was made.

V. S. 901, Judicial Disqualification.—A commissioner upon sewer assessments is not disqualified by the fact that an abutting owner who has paid his assessment before the hearing, is related to the commissioner within the fourth degree.

Acts 1892, No. 126, is not void by reason of uncertainty in respect to the territory thereby included in the village of St. Albans.

Sewer Assessments.—An assessment under a statute providing that persons benefited by the laying and construction of a sewer may be assessed therefor to the extent of their just share, is not rendered invalid by a failure to assess sixty feet of the adjoining frontage, when it does not appear affirmatively that such land was benefited by the sewer.

Petition Improperly Dismissed.—Although there was no error in the proceedings of the municipal board, the petition to the county court in the nature of an appeal ought not to have been dismissed, as it was that which gave the county court jurisdiction in the premises.

PETITION in the nature of an appeal from an assessment by the trustees of the village of St. Albans against an abutting owner for the construction of a sewer. Heard on the commissioners' report, at the September term, 1898, Franklin county, *Tyler*, J., presiding. Petition dismissed and judgment for the petitionee to recover the assessment and costs. The petitioner excepted.

The village of St. Albans upon a petition of the freeholders and voters of the village constructed a sewer on Weldon, Edward and Russell streets in said village. The Weldon

street sewer extended from Stevens's brook on the east, toward the west in Weldon street, in which the main sewer had been laid. Edward and Russell streets run parallel north and south intersecting Weldon street, and the sewers therein laid running north and south connected with the main sewer on Weldon street. The total length of the sewers was 3,530 feet. The cost of construction was $2,244.12. The trustees assessed the cost upon the abutting landowners according to their respective frontages, which was at the rate of thirty-two and a half cents per foot. The petitioner was assessed upon a frontage of two hundred and fifteen feet in the sum of $69.87, from which assessment by her attorney she brought her petition as owner to the Franklin county court at its April term, 1894, setting forth her grievance and asking for the appointment of commissioners; who were appointed, heard the cause and reported among other things that the premises in question if connected with the sewer would receive benefit therefrom, and that its just share toward the expense is the sum above named. The sewer is found to be within the corporate limits of the village of St. Albans under the act of 1892, and the inaccuracies mentioned in no way affected the boundary line with respect to the petitioner's land and the sewers in question. As to the frontage omitted from the assessment, the commissioners find that it was not assessed to any one person but was assessed to all, for the reason that it was contemplated to extend Weldon street, which would take this land, but that this extension had not yet been made.

E. A. Sowles for the petitioner.

Farrington & Post and *Wilson & Hall* for the petitionee.

THOMPSON, J. It is not necessary to decide whether the petitioner is estopped from denying that she is the owner of the land in question, by the allegation in her petition that she is the owner thereof. If the judgment of the

county court can be fairly sustained by any inference of fact it might have drawn from the commissioners' report, it is to be presumed in this court, that the county court based its judgment on such inference. *Russell* v. *Davis*, 69 Vt. 275, and cases there cited. From the facts reported by the commissioners and the allegation of ownership in the petition, the county court must have inferred and found that the petitioner was the owner of the land benefited by the sewer assessment in question. In view of the other facts found, there was nothing in the exhibits introduced in evidence by the petitioner to preclude such an inference.

(2) The commissioners find that Luther B. Hunt, Jr., an abutting proprietor, had paid his assessment before the hearing in this case. This removed the disqualification, if any existed, of commissioner Luther B. Hunt, by reason of his relationship to him.

(3) No. 126, Statutes 1892, is not void by reason of uncertainty in respect to the territory thereby included in the village of St. Albans. This being so, its trustees had jurisdiction in respect to the sewer in question.

(4) The report of the commissioners shows that all the proceedings in respect to the sewer and the assessments therefor against abutting property owners were regular and such as were required by law, in all particulars. Therefore the petitioner cannot prevail on her contention in regard to this phase of the case.

(5) It is found that the petitioner's land is benefited to the extent of $69.87 by the laying and construction of the sewer, and that the just share which it should contribute toward the expense thereof is that sum. This is only another way of saying that that is the petitioner's just share of such expense based on the special benefit which she receives. This is the same amount assessed by the trustees in the original proceedings. Section 8 of No. 192 of St. 1876, provides that persons benefited by the laying and construction of a sewer may be assessed therefor to the

extent of their just share towards the expense of laying and constructing the same. It is not apparent from the report, nor from anything urged by the petitioner, that the method of apportionment adopted was not just and equitable as to her and the other property owners of this sewer district. On the contrary it appears that $69.87 is her just share of the expense.

It is urged by the petitioner that the failure to assess fifty-eight to sixty feet of frontage next south of the premises in question, on Russell street, was error, for that such assessment would have lessened the amount of her assessment by about $1.40. It nowhere appears in the record that this land was benefited by the sewer. Such a finding is necessary to make it subject to assessment. On the contrary, the finding in respect to the just share of the cost of the sewer, which the petitioner should pay, is impliedly a finding that this frontage of fifty-eight to sixty feet was not benefited. The record not showing error affirmatively, it will not be presumed.

(6) The petitioner was in no way harmed by the admission of No. 191 of St. 1894, as no fact was found from it, nor could the decision of the court below have been affected thereby. Hence, it is not necessary to decide whether it was error to admit it, as in any view of the case it was not reversible error. Nor have we been able to discover any error in respect to the admission of other evidence.

The petition ought not to have been dismissed as it was that which gave the county court jurisdiction in the premises.

Judgment dismissing the petition is reversed, and judgment for the petitionee to recover sixty-nine dollars and eighty-seven cents damages and its costs.

CATHERINE ATKINS *vs.* GEORGE ATKINS and ALFRED ATKINS, exrs., et als.

May Term, 1899.

Present: ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 21, 1899.

Application of Payments.—The rule is well settled in this State that general payments and credits will be applied to extinguish indebtednesses in the order of time in which they accrued.

CHANCERY. At the March term, 1899, Chittenden county, before *Taft*, Chancellor, the case came on for hearing under a mandate of the supreme court and the report of the master filed in pursuance thereof; whereupon it was adjudged that the oratrix recover of the defendant the sum of $4,719.96 with interest since March 8, 1899, which the defendant was to pay within sixty days with costs, and in default thereof the notes and mortgage described in the bill were to become the property of the oratrix in payment *pro tanto* of the sums decreed. The oratrix appealed.

One contention of the oratrix was that the payments applied by the Chancellor in reduction of her claim should have been treated as payments toward her share as legatee in the estate of Hiram Atkins.

C. G. Austin and *H. A. Burt* for the oratrix.

Dillingham, Huse & Howland for the executors.

THOMPSON, J. This case does not involve the settlement of the estate of Hiram Atkins, deceased, now pending in the probate court. Whatever may be the rights of the oratrix in the settlement of that estate, it is left for that court to determine.

The right of the oratrix to the $5000 received on policy No. 156,000 issued by the New York Life Insurance

Company and to $684.94 received on policy No. 4967 issued by the National Life Insurance Company, and the manner in which the defendants should account therefor, was determined when this case was before this court as reported in 70 Vt. 565.

The only question for decision is as to how payments shall be applied which were made by the defendants to the oratrix, without any direction as to their application, and which have not been applied. From the time the defendants received on said policies the sums of money held to belong to the oratrix such sums were due and owing from them to her. They were the first indebtedness in order of time, if any other existed, from them to her. The rule is well settled in this state, that general payments and credits will be applied to extinguish indebtednesses in the order of time in which they accrued. *Morgan* v. *Tarbell*, 28 Vt. 498; *Pierce* v. *Knight*, 31 Vt. 701; *St. Albans* v. *Failey*, 46 Vt. 448. This is the rule adopted by the court of chancery in making the decree from which this appeal was taken. The decree in this respect was in accordance with the law, and upon the facts disclosed was equitable as between the parties.

Decree affirmed with costs to the defendants and case remanded to the court of chancery.

SAMUEL HOWARD *vs.* JED P. CLARK, HENRY O. CLARK and E. D. TEACHOUT.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 21, 1899.

Master's Finding Conclusive.—The master's finding as to what was included in the mortgage description is conclusive.

Merger.—Although the mortgagee, in taking a deed of the equity of redemption from the mortgagor, intended that the mortgage debt should be extinguished, yet the legal and equitable estates will be held not to have merged, inasmuch as the mortgagee was led by the mortgagor to believe the premises free from incumbrance, and accepted the deed by reason of the mistake into which he was thus led.

Record Notice.—The record of the subsequent mortgage was not constructive notice to the prior mortgagee, and he was not guilty of negligence in failing to search the record.

Equality is Equity.—But in granting this relief to the prior mortgagee, the mortgagor must be restored so far as possible to his rights as mortgagor and allowed to redeem.

Subsequent Mortgagee not Injured.—The subsequent mortgagee cannot object to the orator being restored to his rights as senior mortgagee, for he had both constructive and actual notice of the prior incumbrance when he took his own.

CHANCERY. The case came on for hearing upon pleadings and master's report, at the March term, 1899, Chittenden county, before *Taft*, Chancellor, who rendered a *pro-forma* decree dismissing the bill as to defendant Teachout with costs and without prejudice, and for the orator against the other defendants. The defendants Clark appealed.

This was a petition to set aside the mortgage of defendant Jed P. Clark to Henry O. Clark and the quitclaim deed of Jed P. to the orator, to foreclose the mortgage of Jed P. to the orator, and to enjoin the defendant Teachout from conveying the premises.

December 10, 1883, Jed P. Clark executed to the orator a mortgage of a farm in Milton of about 500 acres, called the Barnum farm, to secure $4,000. The premises were then free from encumbrance. February 14, 1885, said Clark executed a mortgage of the same premises, together with other real estate to secure the grantees therein from liability as his bondsmen. This mortgage was discharged by quitclaim deed of the bondsmen July 25, 1893. September 8, 1892, Jed P. Clark executed a mortgage to Henry O. Clark of certain lands in Milton, the description of which in the mortgage was more extensive than the limits of the Barnum farm, but included that farm. The condition of this mortgage was that Jed P. Clark should pay a note for $325 and all present and future indebtedness from the mortgagor to the mortgagee. This mortgage was given in good faith; the note for $325 was given for cash loaned at the time, and there was then due to the mortgagee an additional sum of $13,376.84, with some interest. The mortgage was duly recorded on the day of its date. This mortgage contained a covenant of warranty that the premises were free from all encumbrance, but the mortgagee at the time of its execution had knowledge that the debt of the mortgagor to the orator was past due and that the prior mortgage to secure this debt was in life and undischarged.

Subsequently to the date of the mortgage of Jed P. Clark to Henry O. Clark, namely, March 21, 1893, said Jed P. conveyed the Barnum farm to the orator by quitclaim deed under the following circumstances. The orator was about to foreclose when Jed P. proposed to quitclaim the farm in discharge of the debt. The orator asked for a warranty deed. Jed P. replied that he was unable to give that by reason of the existing prior mortgage to his bondsmen, which, however, he said would soon be cleared off. He made no reference to the mortgage to Henry O. Clark. The orator had no knowledge of this mortgage and did not

consult the record. By common arrangement a conveyancer drew the deed, computed the amount due on the notes including interest, the precise and full amount of which was endorsed on the notes named in the deed as the consideration thereof. The deed was delivered to the orator and the notes were left with the conveyancer to be delivered to Jed P. Clark whenever the mortgage to the bondsmen should be discharged, but although such mortgage was subsequently discharged the notes were not delivered up because they were not called for, and nothing further was done to discharge the mortgage of Jed P. to the orator. The master found that it was intended by the parties to pay and discharge the debt by the deed, but that the orator was led by said Jed P. to believe and did believe that the premises were free from encumbrance except the mortgage to the bondsmen, and he would not have abandoned his foreclosure proceedings and concluded the arrangement had he believed otherwise. The orator entered into possession of the premises and contracted to sell them to Murray, who took possession under his contract but received no deed. Murray sold his interest to Teachout. Afterwards the orator sold and conveyed the premises to Teachout by warranty deed, being still ignorant of the mortgage to Henry O. Clark. Teachout went into possession, divided the farm into lots and developed the property for building purposes to accommodate the employes of a neighboring pulp mill in process of construction. The purchase price of the premises from the orator to Teachout was $4,800. The value of the land at the date of the deed to Howard was $4,000; at the date of the sale to Teachout $4,800; at the present time $8,000, exclusive of two cottages and one double house which Teachout has constructed on the premises; the increase in value being due to the prospect of the construction of the pulp mill.

C. W. Witters for the orator.

Powell & Powell for defendant Henry O. Clark.

WATSON, J. The orator's mortgage covers only the "Barnum Farm;" and the mortgage to the defendant Henry O. Clark covers land described in the deed as "all lands owned by said Jed P. Clark between Lamoille river and the highway running from the residence of C. D. Ladd to the foot of the hill at Milton Lower Falls, so called." The master has found that the description in the mortgage to Henry O. was much more extensive than the limits of the "Barnum Farm," but included it, and was so understood by the parties. This finding is conclusive, and the mortgage must be construed and considered accordingly.

The important question for consideration is the effect of the conveyance of the equity of redemption in the "Barnum Farm" by the mortgagor to the orator, under the facts and circumstances disclosed by the master's report. Was the effect to merge the legal and equitable estates? and if it was, is the orator entitled to relief in equity?

As a general rule the conveyance of the equity of redemption to a mortgagee will not constitute a merger of the legal and equitable estates, when from all the circumstances it is apparent that the best interests of the mortgagee require the two estates to be kept separate, unless it is found that such was the intention of the mortgagee. The intention of the mortgagee governs, and when his intention to merge the two estates is established, it controls. *Belknap* v. *Denison*, 61 Vt. 520; *Carpenter* v. *Gleason*, 58 Vt. 244; *Walker, Smith & Co.*, v. *Baxter*, 26 Vt. 710.

The master has found that it was intended by the orator and mortgagor to pay and discharge the orator's debt by the deed of the equity of redemption, and it is contended by the defendant, Henry O., that this, in effect, is a finding of an intention by the orator to merge the two estates, and that making the mortgage of Henry O. the first encumbrance

upon the property is but the legal effect or result of the orator's intentional act, from which a court of equity can grant no relief without annulling the very contract intentionally and understandingly entered into by the parties. *Proctor* v. *Thrall*, 22 Vt. 262. But this finding is to be considered in connection with the further findings that the orator had no knowledge of the mortgage to Henry O., and that the mortgagor then led the orator to believe, and he did believe, that the premises were free from encumbrance, except the mortgage to the bondsmen, and that he would not have abandoned his foreclosure proceedings and concluded the arrangement then made, had he believed otherwise. The record of Henry O.'s mortgage was not constructive notice to the orator, and no duty rested upon him to examine the records for subsequent encumbrances—*Johnson* v. *Valido Marble Co.*, 64 Vt. 337—and therefore he was not guilty of negligence in failing so to do. The mortgagor had full knowledge of the mortgage to Henry O., and that it covered the "Barnum Farm;" he had no equity of value in the farm, and he was personally holden to the orator for the payment of the debt secured by his mortgage; he was also personally holden to Henry O. for the payment of the debt secured by mortgage to him, which he knew amounted to several times the value of the farm; and he knew that to give the orator a deed of the equity of redemption, in payment and discharge of his debt, and thereby make Henry O.'s mortgage a first encumbrance upon the farm, was to pay and discharge the debt without any consideration of value moving to the orator therefor, and that he would thereby be relieved from personal liability thereon. Under those circumstances, for the mortgagor to lead the orator to believe the premises free from encumbrance, except the mortgage to the bondsmen, to induce him to accept the deed of the equity of redemption in payment and discharge of his debt, was to obtain

possession of the orator's notes as paid and discharged, by fraudulent means, and with this fraud thus established, the fact found as to the intention of the orator is rendered without force, and a court of equity will relieve the orator from the unconscionable position in which this fraud has placed him, by re-instating him in his rights under his notes and mortgage as they existed before the taking of the deed. 2 Jones on Mort., §§ 966, 967.

And because of the fraud practiced upon the orator when he took the deed, he was laboring under such a misapprehension of the material facts relative to the subject matter which entered into the transaction, as also to entitle him to relief in equity on the ground of mistake. 2 Jones on Mort., § 969.

But equality is equity, and in granting relief to the orator, the defendant Jed P. must, so far as possible, be restored to his rights as mortgagor with the privilege of redeeming the premises by paying the orator the sum found due in equity upon his mortgage with costs of suit, within such time as may be fixed by the court of chancery for that purpose.

Notwithstanding the fact that the mortgage to Henry O. contained a covenant of warranty that the premises were free from all encumbrance, he not only had constructive notice of the orator's mortgage, but he had knowledge in fact that the orator's debt was past due and unpaid and that the mortgage securing the same was in life and undischarged. His mortgage when made, as to the "Barnum Farm," was only upon the equity of redemption, and such it is with the orator re-instated in his rights under his mortgage. His position is in no wise changed, and he cannot object to the orator's being restored to his rights as senior mortgagee, when he himself suffers no injustice thereby. 1 Jones on Mort., § 967.

The equitable adjustment of the rights of the defendant Teachout may involve the consideration of matters not

now before the court, and, as to him, this case should be so disposed of as not to prejudice his rights in the premises.

Decree reversed and cause remanded with mandate that the orator's notes and mortgage be and are in full force, and the mortgage re-instated as senior encumbrance upon the "Barnum Farm," so called; that the quitclaim deed of the equity of redemption from the defendant, Jed P. Clark, to the orator, be and is null and void; that the bill be dismissed with costs and without prejudice as to the defendant Edgar D. Teachout; that the orator's mortgage be foreclosed as against the defendants Jed P. Clark and Henry O. Clark, with the right in the said Jed P. and Henry O. to redeem the premises therefrom within a time to be fixed by the court of chancery; and that the orator recover his costs of the said Jed P. Clark and Henry O. Clark.

L. E. PELTON *vs.* WILLIAM A. PLACE and CHARLES F. SKEELS.

May Term, 1899.

Present: ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 25, 1899.

Whose Deed?—A lease which names an association as lessee and declares that in the transaction the association acts by certain of the signers as directors, is nevertheless the deed not of the association but of the signers, if it is executed in their names and with their seals.

Whose Deed?—It is immaterial that the signers on the part of the association act, and are understood to act, as directors and not otherwise, for, the association being unincorporated, they act for themselves as well as for their associates and are therefore bound.

Non-joinder—Demurrer—Objection must Be Availed of at Hearing.—An

objection for non-joinder of defendants in chancery cannot be taken by demurrer unless the defect is apparent on the face of the bill; and if the objection is made by answer to be availed of at the hearing, it must appear by the decretal order to have been so availed of, or it will be disregarded in this court.

Parties—Some as Representing All.—Especially should the objection be disregarded in the present case, in which the parties who might be joined are numerous and the defendants fairly represent the interests of all.

Chancery Jurisdiction.—Chancery has jurisdiction to enforce payment of rent upon a lease, joint and not several, in which the same party is both a lessor and a lessee, for an action at law would not lie.

Rent Passes as Incident of Reversion.—When a lessor quitclaims a part of the demised premises, his interest in the lease as to that part, and a proportionate share of the rent, pass as an incident of the reversion.

Attornment.—If afterwards the grantee lease to the original lessee, it constitutes an attornment by the lessee, and as it involves notice of the conveyance, it is good as to the rent in arrear which has accrued since the conveyance.

Attornment.—An attornment is not necessary under our system of conveyances, to complete the validity of an assignment of a reversion, and being thus inapplicable to our situation and circumstances, the doctrine was not adopted by our statute as a part of the common law; consequently the assignee is entitled to all arrears of rent that have accrued since the conveyance and have not been paid to the grantor in default of notice.

Attornment.—But if the assignee lies by and permits the tenant without notice to pay rent to the lessor as it falls due, he cannot complain; and such seems to have been the common law when the grant passed the estate without attornment, as it did by some modes of conveyance.

How Foreclosed Lessor May Keep His Lease Alive.—A lessor who loses his title to the demised premises by a decree of foreclosure, may at the same time take a lease of the premises from the foreclosed mortgagee, and thereby feed his own lease and be entitled to have it still performed on the part of his lessee.

Lessee cannot Abandon because He Fears a Breach.—A lessee cannot by anticipation, and because he fears, treat the lease as broken by the lessor because his interest is not in the first instance sufficient in point of time to feed the lease during the remainder of the term; for while the lessor is performing and does not renounce the lease, the lessee is bound to know that he may continue to perform, and must wait until the actual breach.

Acceptance of Abandonment—Surrender of Term.—When the lessee has abandoned the premises, the lessor cannot let them and receive pay therefor, even for a day, without accepting the abandonment and working a surrender of the term as matter of law.

Eviction, Intent necessary to.—A mere taking back of a portion of the demised premises by the lessor, is not as matter of law an eviction, in the absence of the requisite intent.

CHANCERY. Heard upon pleadings, master's report and exceptions thereto, at the September term, 1898, Franklin county, before *Tyler*, Chancellor, who overruled the defendants' exceptions and rendered a decree for the orator, for $79.65, with interest from June 15, 1898, and costs. The defendants appealed.

In the early spring of 1885 the defendants and others, wishing to form an association for horse training and racing, and finding that the orator and the defendant Skeels owned severally two adjoining tracts of land suitable for a course, entered into an arrangement with the orator whereby the orator and Skeels were to lease to them for the purposes of such an association; and accordingly the orator and the defendant executed agreement Exhibit A, dated March 2, 1885, and expressed to be between "L. E. Pelton and Charles Skeels on the one part and W. A. Place and his associates on the other part." By it Pelton and Skeels agreed to lease a plot therein partially described and extending so far as necessary to make the course, for the term of ten years, for use as a trotting course, and Place and his associates agreed to pay as rent $40 per year by June 15th of each year, to be divided between Pelton and Skeels in proportion to their respective ownerships in the land taken. The instrument was sealed and acknowledged by the orator and the defendants and duly recorded. Thereupon the association was completed and organized under the name of the Highgate Driving Club with the usual officers, and having ascertained the quantity of land needed, on July 2, 1885, entered into a lease with Pelton and Skeels,—Exhibit B. The instrument states itself to be an agreement "Between L. E. Pelton and Charles F. Skeels on the one part and the Highgate Driving Club by its directors W. A. Place, C. F. Skeels and Byron Tuller on the other part," but is signed, sealed and acknowledged by said individuals each in his own name alone. By its terms Pelton and Skeels "agree to lease and do hereby lease" a tract

exactly described, for the term of ten years from the second day of March, 1885, to be used as a driving course; and Place, Skeels and Tuller agree to pay Pelton and Skeels "a yearly rental of three dollars per acre by the 15th day of June, each year," and that "as between Pelton and Skeels said yearly rental is to be divided so that the said Skeels shall have fifteen dollars and said Pelton $28.93," and that if the rent remain unpaid for one month after it becomes due Pelton and Skeels may re-enter and take possession, either jointly or each of his own land. Exhibit B was also duly recorded. The master finds under objection that Place, Skeels and Tuller signed Exhibit B as directors of the club, and in no other capacity, and were thereunto authorized, and that the orator so understood it at the time. The rent was paid to July 2, 1892.

The National Life Insurance Company of Montpelier, Vermont, held a mortgage upon the orator's home farm including all the land leased by the orator to the club, except two and one-half acres known as the "Green lot." The mortgage was dated August 31, 1875, and duly recorded, but the club or the defendants did not know of its existence. It was foreclosed against the orator and all claiming under him by a decree expiring April 20, 1889, but neither the defendants nor the club were made parties.

March 31, 1890, the orator quitclaimed all his real estate including the Green lot to Marsh. The first actual notice of the mortgage decree or quitclaim deed, to any member of the club, was late in the spring of 1890.

When Place paid the orator the rent due June 15, 1890, for the year in advance, he notified the orator that the club would not pay any more rent unless the orator procured the club a lease from the Insurance Company, which the orator refused to do. July 9, 1891, Skeels for the club paid the orator to July 2, 1892, and notified him that the club would pay no more rent, but would surrender the lease when the year expired and that he, Skeels, should take back his

portion of the land, (and he did so), and that he, Pelton, would have to take his. The master is unable to find that the orator ever agreed to take back his land and release the club.

About May 23, 1892, Skeels took off the lock from the gates and they went to decay, and the track for 1892 and 1893 was left open and was not occupied by the club, but occasionally during those two years individual members of the club, including Skeels, went on to the track and drove horses there.

Up to April, 1894, the orator leased the home farm of the Insurance Company from year to year, but the leases were not recorded, and the defendants had no notice of them.

On July 4, 1893, certain parties procured the track of the orator, and used it to celebrate the day, paying him therefor four dollars. In 1894 the orator leased the home farm, of the Insurance Company, except the land covered by the track. The Insurance Company and Marsh leased to Place their portions of the land respectively.

**L. E. Pelton*, the orator, *pro se.*

C. G. Austin for the defendants.

ROWELL, J. In the lease of July 2, 1885, which is the foundation of the suit, the orator and the defendant Skeels are lessors, and The Highgate Driving Club is named as lessee, and as acting in the transaction by the defendants and Tuller, its directors. But the instrument is not the deed of the Club, for it is not executed in its name nor sealed with its seal, but is signed and sealed by the defendants and Tuller in their individual capacity only. The master has found on parol testimony objected to, that they in fact signed as directors and not otherwise, and were thereunto authorized, and that the orator so understood it at the

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*The orator, who was ninety-two years old March 28, 1899, and admitted to the bar in 1832, made his own brief, and argued his case alone.—[REPORTER.

time. But it is not necessary to decide whether the parol testimony was admissible or not; for if it was, as it appears that the defendants were themselves members of the Club, and does not appear that the Club was anything more than a voluntary association without corporate existence, in acting for the Club they acted for themselves as well as for the other members, and therefore bound themselves. The case then, at most, is one of nonjoinder of defendants, if indeed it is even that, as the bill is based upon the lease, which is under seal, and does not name any other persons who should be defendants. The defendants demurred in their answer for misjoinder of defendants, as we construe the pleading, and we suppose the demurrer was seasonably brought on and overruled, though the record furnished us does not show it. If so, it was properly overruled, for as a want of defendants does not appear on the face of the bill, the objection could not be taken by demurrer. But if the answer means that the objection was taken to be availed of at the hearing, the decretal order does not show that it was then availed of; and as the members of the Club are numerous, as shown by the answer, and the defendants fairly represent the interests of all, and a full and complete decree can be made between the parties before the court without prejudice to the rights of the other members,—the objection is not noticed. *Dewey* v. *The St. Albans Trust Co.*, 60 Vt. 1.

The defendant Skeels being both lessor and lessee in said lease, which is joint and not several, the suit is properly brought in chancery, for an action at law could not be maintained thereon, as Skeels would be on both sides of the record.

By the deed of March 31, 1890, whereby the orator conveyed to Marsh all his interest in that part of the demised premises called the Green lot, his interest in the lease as to that part, and a proportionate share of the rent, passed as an incident of the reversion, according to the

maxim, that the incident shall pass by the grant of the principal. The defendants and other members of the Club learned of this conveyance from the land records soon after it was made; but Marsh said nothing to them about it till the spring of 1894, when he leased to them for that year. This was an attornment; and as it involved notice, it was good from the time the rent then in arrear began to accrue, which was subsequent to the conveyance.

At the common law, by some modes of conveyance, the assignment of a reversion expectant on a term for years or for life, was incomplete without the attornment of the tenant. If he refused to attorn, he was not liable to the assignee for rent. But this principle was inconvenient, and a great clog upon transfers, as tenants would sometimes unreasonably refuse to attorn. To remedy this, the 4 Anne, c. 16, made assignments of reversions valid in all cases without attornment, but provided, for the protection of the tenant, that all payments of rent to the lessor before notice of the assignment should be good.

The doctrine of attornment was a product of feudalism, and sprang from the peculiar nature of the feudal bond. Attornment is not necessary under our system of conveyances, to complete the validity of an assignment of a reversion; and therefore, not being applicable to our situation and circumstances, that doctrine was not adopted by our statute as a part of the common law. And although the statute of Anne may not be in force in this state, yet, as the title of the assignee is complete without attornment, we hold on the ground of universal equity, as they do in Massachusetts, that he is entitled to all arrears of rent that accrue after the conveyance and are not paid to the grantor in default of notice, and no more; for if he lies by and suffers the tenant without notice to pay rent to the lessor as it falls due, he has no reason to complain. Indeed this seems to have been the common law when the grant passed the estate without attornment, as it

did in the case of a fine or a deed of uses on which the statute of 27 Henry VIII. operated. In *Birch* v. *Wright*, 1 Term 385, Mr. Justice *Buller* cites *Watts* v. *Ognell*, Cro. Jac. 192, as strong proof of how much equity and good sense have always prevailed in the law. That was debt for rent by the assignee of a reversion under a fine levied to his use. It was objected in arrest of judgment that the declaration was not good, because it was not alleged that the lessee had attorned, nor that he had notice of the use limited; and that even if the assignee might avow without attornment, yet notice ought to be given the lessee, for otherwise he would be at mischief, for the use might be limited and he, not knowing it, might pay rent to his ancient lessor; and that therefore it was not reason that he should be charged without notice, which ought to be shown by the declaration. The court doubted on this point at first, but finally decided that the action was well brought, and that notice need not be alleged. But it agreed that the lessee was not bound to pay without notice, and if he had paid without notice, that it was a good excuse for him, and might be plead; and if he had not paid, that the action gave him notice to pay to the assignee, and then he was chargeable for all that was not paid. Mr. Justice *Buller* says that this case, though decided almost a hundred years before the passage of the statute of Anne, established the same rule that the act professed to make.

The orator cannot, therefore, recover any rent in arrear that accrued on that part of the dèmised premises deeded to Marsh, as it all accrued after the conveyance. It is unnecessary to inquire as to the efficacy of the actual notice from the land records, as no question is here involved as to rent already paid to the orator.

But as to the rest of the demised premises, which is a part of the farm mortgaged to the insurance company, the case stands on different ground. As the rent in question that accrued thereon, accrued after the company's decree of

foreclosure became absolute, it is unnecessary to consider the rule between mortgagor and mortgagee in respect of rent that accrues on a lease given by the mortgagor subsequent to the mortgage and without the mortgagee's consent. That rule is very different from the one we have been considering. The defendants were not affected by that decree, as they were not parties to the foreclosure; and although the orator's title as mortgagor was thereby taken away, yet he at the same time acquired an interest in the farm by lease from the company, and that interest was continued by annual leases until April 1, 1894, when it ceased in the part covered by the defendants' lease, and the company let it to one of the defendants.

The defendants continued to occupy and pay rent until July 2, 1892, when they abandoned the premises on account of the character of the orator's title, and refused longer to pay rent, and Skeels "took back" his portion of the land; and although he occasionally drove horses on the track that year and the next, it cannot be said, on the facts found, that he did it under the lease. As the orator's new interest was sufficient while it lasted to feed the lease, the defendants could not during its continuance abandon the premises as they did, and their obligation to pay rent continued notwithstanding such abandonment. They could not by anticipation and because they feared, treat the lease as broken by the orator because his interest was not in the first instance sufficient in point of time to feed the lease during the remainder of the term, for he had not renounced the lease, nor was it out of his power to perform, for he was performing, and might continue to perform, for aught the defendants knew. They were bound, therefore, to wait till the breach came, when they could seek such remedy as the lease afforded them; and if it afforded them none, it was their fault that they did not stipulate for one.

The master was unable to find that the orator ever expressly agreed to take back his part of the land, or

otherwise released the defendants from the payment of rent; but he finds that on July 4, 1893, he let the premises, and on his own account, it would seem, to other parties for a celebration, and was paid therefor the sum of four dollars. This he had no right to do if he would still hold the defendants for rent, as it interfered with their right of dominion and control, and therefore it was a resumption of possession by him, and an acceptance of the defendants' abandonment, which worked a surrender of the term by operation of law. *Welcome* v. *Hess*, 90 Cal. 507: 25 Am. St. Rep. 145.

What Skeels did by way of "taking back" his part of the land did not amount to an eviction as matter of law, for the requisite intent does not appear.

The orator, therefore, is entitled to rent for the year ending July 2, 1893, with interest thereon, for that part of the demised premises that is on the home farm. The finding that rent was paid to July 2, 1892, instead of only to March 2, 1892, is well warranted in law.

Reversed and remanded, with mandate.

LUTHER BAKER & SONS *vs.* F. M. SHERMAN, O. C. MILLER, and L. C. LEAVENS.

January Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON and WATSON, JJ.

Opinion filed May 8, 1899.

Expert Evidence.—The age of marks or spottings upon trees is a subject for expert evidence.

Age of a Tree Shown by Its Rings.—The court finds no reason to doubt the long-accepted theory that the years of a tree can be approximately determined by counting the concentric layers in its grain.

Woodsmen and Surveyors as Experts.—Such experience and familiarity with matters of this kind as is had by woodsmen and surveyors, constitute peculiar knowledge, and give special skill in determining the age of trees, and such, especially if they have been accustomed to examine with the glass, may testify as experts.

An Exception Implies a Ruling.—When exceptions are allowed to remarks of counsel they are to be treated as implied rulings that the remarks are proper.

Remarks of Counsel Disapproved.—Counsel should refrain from remarks during the examination of witnesses, putting the question directly and receiving the answer without comment; but the infractions of this rule shown by the record are not such as to call for a reversal of the judgment.

Opinion Evidence.—The question being the value of a tract of timber land, a witness who has looked out a route for a logging road, and estimated the cost per thousand of removing the lumber and building the road, and who has testified upon these subjects, may add his opinion as to the feasibility of making the road for the quantity of timber claimed to be standing upon the tract.

Question without Offer.—It is not error to exclude a question unaccompanied by an offer.

Question Improper in Form.—A question was properly excluded as implying a fact not yet shown.

Competency a Question for Trial Court.—The competency of witnesses to speak upon a given subject is a question exclusively for the trial court.

Competency and Weight Distinguished.—The distinction between the competency and the weight of testimony.

Conduct as Evidence of Belief.—One question being whether the defendants, if they made the representations as to the boundary, knew them to be false, it was proper for them to show that they and the adjoining proprietors had always treated the line as being where they told the plaintiffs it was, and that they believed it to be so.

What Is Rebuttal.—The measure of damages was the difference between the value of the lands if they had been located as represented and their value as located in fact. In the opening, the plaintiffs' witnesses testified that this difference was a certain sum, but did not estimate the value of the stumpage. The defendants' witnesses based their valuation of the land upon the stumpage per acre. In rebuttal, the plaintiffs should have been permitted to show that the amount of stumpage per acre was such as to make the estimate of the defendants' witnesses too low.

Cross-examination Postponed.—The plaintiffs' legal right was not infringed by the postponement of their opportunity to cross-examine.

Cross-examination Restricted.—A surveyor who does not testify in chief that the corner at which he began his survey is an original corner, cannot be cross-examined upon that subject as matter of right.

Theory and Fact.—A surveyor may know where a theoretical line should strike, but he cannot testify where it would, unless he has run it.

Memoranda as Confirmatory Evidence.—Private contemporaneous memoranda and letters written by the witness, by which his recollection is refreshed, are admissible in aid and confirmation of his testimony.

Res ipsa loquitur.—Counsel have no right to ask a witness what a paper shows, when the paper is in the case and speaks for itself.

Contradicting a Witness.—A witness who vouches a document or book in support of his statement may be contradicted by the production of the same.

Document in Connection with Testimony.—A deed referred to by a witness on cross-examination was properly admitted in re-examination as explanatory of his testimony.

Elements of Value—Cross-examination.—To show the value of the land it was not error to permit the defendants to prove what it would cost to deliver the timber at a certain market. But it was not cross-examination to ask the same witness what it would cost to deliver it at another place.

Construction of Deed—Law and Fact.—The court cannot hold as matter of law that a deed conveying certain lots by number includes all the land within a mountain crest, merely because the deed contains a stipulation that the grantee shall cut the timber clear to the crest.

Law and Fact.—It cannot be said as matter of law that the defendants were bound to inform the plaintiffs that the boundary line had been disputed, if they honestly believed that it was where they represented it to be, for the dispute might be nothing worthy of mention.

Trial Court May Express Opinion as to Weight of Testimony.—The trial court has a right to express its opinion as to the relative weight of evidence, and in the present instance the caution was eminently proper.

Affidavits of Jurors Inadmissible to Impeach Verdict.—Affidavits of jurors are inadmissible to show that they misunderstood the charge.

CASE. Plea, general issue. Trial by jury, September term, 1897, Franklin county, *Start*, J., presiding. Verdict and judgment for the defendant. The plaintiffs excepted.

The first count of the declaration alleged that the defendants sold to the plaintiffs all their, the defendants', interest in a tract of timber land by knowingly, falsely and fraudulently representing that it was bounded by Canada line on the north, and by the crest of a mountain range on the east, west and south, whereas a portion of the tract deeded lay beyond the crest, and a portion of the tract within the crest was not included in the deed; wherefore the tract was much less valuable, and the plaintiffs were damaged.

The second count alleged that the defendants sold to the

plaintiffs all their, the defendants', interest in that part of lot 4, range 6, of the town of Jay lying west of a mountain crest, by knowingly, falsely and fraudulently representing that such part contained fifty-five acres, whereas it contained only twenty-three acres.

Upon trial, the principal contentions were three. The first related to the representations; the second to the actual boundaries of the tract conveyed; and the third to the value of the land as bearing on the question of damages.

In the following statement, the exceptions are dealt with separately and numbered as in the opinion.

(1) Dewart was a witness for the plaintiff. Before the excluded question was put to him, he had testified that he was a graduate of Harvard University and the Lawrence Scientific School, had taught surveying and trigonometry for fourteen years, and had been a practical operating surveyor since 1880. He produced and identified certain blocks showing the spottings on the double birches and on other marked trees on or near the lines in question, and was then asked if he could tell from those blocks the age of the marking. He replied, "I can tell some things. I can't tell the precise age." He was next asked if he had examined them for that purpose, and answered, "Yes." He was then asked, "How long, in your opinion, had those marks been on the double birch trees?" Defendants' counsel objected, that the witness had said he could not tell. The court ruled, "We will exclude the question in view of what has been said;" and plaintiffs' counsel excepted. The witness was then further asked if he could tell the probable age or time from the marking, and answered that he could. He was asked to do so; but the question was excluded and the plaintiffs excepted.

Before these questions were asked and this ruling made, the witness had not testified that he had ever counted or attempted to count the rings upon a tree, or that he had any knowledge how to determine the age or marks upon

trees,—or that he knew of any method by which the age of a mark upon a tree could be determined; and no evidence had been offered tending to show that the witness had any skill in this particular. But afterwards the same witness testified that he had used a magnifying glass every week day for ten or fifteen years and that he had examined and counted rings on wood to determine the age. The offer was not renewed.

(10) (11) (12) (13) (37) The defendants were allowed to show that while they were the owners of the lands in question, the adjoining owners had cut the timber to the line which the defendants were now claiming as the true line, and beyond the line which the plaintiffs were now claiming as the true one, and that the defendants had acquiesced in such cutting believing it to be according to the lines of ownership.

(14) (15) (38) The defendants were permitted to show that before the sale to the plaintiffs they had employed a surveyor to divide lot 4 in range 6, for the purpose of a contract which they had with one Bowen, and what the surveyor did and what he reported to them that he had done in respect to that business, as bearing on the good faith of their representations to the plaintiffs touching the division of said lot and their ownership of fifty-five acres therein.

(16) In the opening, the plaintiffs' witnesses testified to the difference in value between the land as it was actually located and as it had been represented by the defendants to be located,—that is, to the difference in value between the land without the crest and the land within the crest, and most of their witnesses stated that the difference was fourteen dollars per acre, and that the land without the crest was worthless.

(28) The plaintiffs' witness Dewart had testified that in regard to a certain corner he had a clue in the statement of the field book of the town that it was a birch tree. The

defense called Dewart and handed him the field book, and was permitted to show by him that its description of that corner was not as he had stated.

(29) Defendant Leavens had testified to his ignorance of the location and boundaries of the land in question. On cross-examination he admitted that he had in his possession, as guardian, a deed of the land running to his ward's father and was asked to produce it before the trial should close. He did so, but the plaintiffs did not offer it in evidence. Thereupon the defendants were permitted to read it to the jury in connection with his testimony. The deed described the property only by reference to former conveyances.

(34) North Troy was shown to be one of the natural markets for lumber in that vicinity.

Requests 1, 2, and 3. The deeds contained a stipulation that the plaintiffs, in cutting timber from the land conveyed, were to begin on Canada line and cut a strip wide enough for a year's operation, and cut the timber on such strip clear to the crest of the mountain.

Ballard & Burleson, *Wilson & Hall* and *G. F. Ladd* for the plaintiffs.

John Young and *H. E. Rustedt* for the defendants.

TAFT, C. J. *Points of Evidence* I. Exc. 1. Whether the southwest corner of lot 4, range 6, was at the double birch trees or thirty-one rods southerly, was a material question, and the marks upon the birches were relied upon to show whether they were of ancient or recent make. The trees had been marked at all points of the compass. The witness Dewart had taken blocks therefrom, and was asked to tell the probable age of the marks; and his answers were excluded. He was permitted to tell the appearance of the marks,—whether old or freshly made,—but was not permitted to tell their probable age. It was a question of expert evidence. The witness said he had had experience

in examining and counting rings in wood to determine its age a great many times for ten years, had used a magnifying glass every week for ten or fifteen years and could tell the probable age or the time when marked. It is argued that the age of a tree cannot be told by counting the rings in its grain and the case of *Patterson* v. *McCausland*, 3 Bland's Ch. (Md.) 69, is cited. However ingenious and learned the reasoning of the court in that case may be, it fails to convince us that mankind has lived under an hallucination in that respect for centuries. Almost everyone acquainted with the subject treats it as true, that the age of a tree can be approximately told by counting the concentric layers in its grain, one of which, as a general rule, is made annually. Even the tree itself in "The Talking Oak" of the late Poet Laureate, Tennyson, voices the popular belief when it says,

> "That though I circle in my grain
> Five hundred rings of years."

It is further urged that the counting of rings in a block of wood is not the work of an expert, but that the jury, having the block before them, were as competent to determine the number of rings as any other person. We hold otherwise. Such experience and familiarity with matters of this kind as is had by woodsmen and surveyors, constitute peculiar knowledge and give a person special skill in determining the age of wood or trees; and if a person has special skill upon a subject he may be called as an expert. *Bemis* v. *C. V. Railroad*, 58 Vt. 636. An examination of paper with the aid of a microscope—a question similar to the one before us—was held the proper subject of expert evidence in *Bridgman* v. *Corey*, 62 Vt. 1.

The testimony was not excluded, for the reason that the court did not find him qualified to testify as an expert. The court said it was "in view of what has been said." There was nothing in what had been said that would justify its exclusion. It was clear he was qualified to speak as an expert. The objection made by counsel was, "It is not a matter of expert knowledge, we say." And it is so argued

in their brief. The only rational view to take of the matter is to treat the testimony as excluded upon the ground of the defendants' objection, viz.—as a matter of expert knowledge. In this there was error and the exception is sustained.

Exc. 2. The witness Webster was excluded as an expert for that the court found he was not qualified to speak as one.

Exc. 3, 17, 21, and 39, are waived.

II. Exc. 4, 5, and 6, point 2. The remarks of defendants' counsel during the examination of witnesses were uncalled for and unnecessary. No objection was made to either of them. None could have been made, as the opposing counsel could not anticipate them. Exceptions were taken to them as soon as they were made, and, from the fact that exceptions were allowed, we treat them as if there were implied rulings that the remarks were proper. In no other way can they be before us, for we only sit in error to revise the rulings, and the refusals to rule, of the court below. There was nothing in the remarks of the counsel that will justify us in reversing the judgment, nor that we must hold was error.

Remarks of a conversational character, during the examination of a witness, should be omitted. Counsel are quite apt to say to a witness, "I wish now to ask you this question." "If you don't care to answer that, I will ask another." And many other questions like them. The proper mode of examining a witness is to ask him questions, omitting remarks of all kinds and receive the answers without comment. There is no necessity of asking leave of a witness to question him, nor stating to him what you propose to ask him. The remarks of the counsel to the witness Judge Chamberlin, "I wish you would answer all you have to say and not have any mental reservations," fairly imply that the counsel thought the witness was not answering frankly, but the statement may have been as prejudicial to the counsel who made it as to the witness who was on the stand.

III. Exc. 6, point 1. The witness Chamberlin testified in cross-examination that he had looked out a route to take the timber east of the crest of the mountain, to a piling ground on the river, had estimated the cost per thousand of taking the lumber to the river, and the cost of making the road, and that there were additional expenses for a bridge and filling a ravine. The plaintiffs then asked him, assuming that there were 300,000 feet of timber east of the crest, if it would be feasible to make the road to get off that amount. The answer was excluded, and we hold improperly. Having a thorough knowledge of the land and the timber, the roads necessary to take off the timber, the ravines to be bridged or filled, the expense of cutting and drawing, he was in a better position to determine whether it was feasible, profitable, to make a road to take off what lumber there was on the land, than the jury would be, with nothing but the facts testified to, without the opinion of the witness. The objection made to this testimony is that the question called for the opinion of the witness, that the jury were just as competent to decide whether it would be profitable to make the road and take off the lumber as the witness. The general rule is that a witness must state fact, not opinion, but it is not universal, nor are the exceptions confined to experts in matters of science, art, or skill. When a witness has had the means of personal observation, and the facts and circumstances which lead the mind of the witness to a conclusion are incapable of being detailed and described so as to enable anyone but the observer himself to form an intelligent conclusion from them, the witness is allowed to add his opinion or the conclusion of his own mind. *Cavendish* v. *Troy*, 41 Vt. 99, and many cases cited in *State* v. *Marsh*, 70 Vt. 288.

The opinion of a person who had traversed the mountain sides, examined the routes for a wood road, the ravines to be crossed and the places to be bridged, and all the

circumstances connected with the matter must necessarily be of greater value than one formed by a juror from the testimony of witnesses detailing the facts only. It is a question somewhat like the ones of value, size, distance, etc., upon which a witness may always express an opinion, if he has sufficient acquaintance in the premises.

IV. Exc. 7. B. F. Place, a witness called by the plaintiffs, was asked, "What do you say as to the value of land seven years ago, and three years ago?" and the answer excluded. There are several reasons why the ruling was proper, but it is sufficient to say that what his answer would have been is not shown, and there was no offer to show any fact by him. It does not appear therefore, that the plaintiffs were harmed. The testimony is referred to and the record shows that no exception was taken to the exclusion of the answer.

V. Exc. 8. The plaintiffs bought lot 4 in range 6, excepting forty-five acres. As the lot was an hundred-acre lot, they should have obtained fifty-five acres and they claim that the defendants represented that lot 4 did contain that quantity of land, and the plaintiffs' testimony tended to show that but fifteen acres was in fact conveyed to them. The question was asked Homer Baker, "Had you any knowledge that more than forty-five acres had been sold off from lot 4 in range 6?" This question was excluded as inadmissible until there was some testimony in the case tending to show such sale. Homer Baker's belief that there were not fifty-five acres in the lot which was deeded to them was a material fact and any testimony tending to show it was legitimate. The defendants may not at the time have owned fifty-five acres in lot 4, although they might never have deeded away any part of it. The form in which the question was put, was objectionable. It carried with it the inference that more than forty-five acres had been sold and it does not appear there was any testimony in the case tending to show there had been.

VI. Exc. 9. This question is upon the subject of damages, is of a character which relates to the weight instead of the admissibility of testimony, and we do not sustain the exception. The testimony in question was that of C. P. Stevens, upon the subject of the value of the land. The objection made was, the witness had no knowledge of the kind, quality or value of the hard wood. He had dealt in hard wood, bought it, manufactured it, and saw the hard wood on the land in question, although not looking for it particularly. Whether he was competent to testify on the subject and also on the subject of the value of the Mooney place as a piling ground, were questions for the trial court, which we do not revise.

VII. Excs. 10, 11, 12, 13, and 37. The plaintiffs allege that the defendants represented to them that all the land sold, lay within the crest of the mountain, but that said representation was false, in that some lay beyond the crest, "as the defendants then and there well knew." In this aspect of the case, it being an action for fraud and deceit only, the defendants' knowledge of the falsity of their representation was a material fact and they could defend by showing that they believed their south line was on the mountain crest.

One question in dispute was whether they knew their representations were false. They could meet that issue by showing by the witnesses Bisbee, Bannister, Sherman and Miller, that they and the adjoining proprietors had always treated the crest line as the division line between them and the adjoining land owner, and that they in good faith believed it to be so.

The testimony under these several exceptions was properly admitted upon this question and therein was no error.

That it was admissible upon the other branch of the case, that is, that the defendants made representations as of their own knowledge, which they did not know to be true, is a question not before us and not considered.

VIII. Excs. 14, 15, 38. In the admission of the testimony noted in these points, the court was governed by the rule applied to the case as stated under the last point, viz.: were the representations false to the knowledge of the defendants, or, were they made as of the defendants' own knowledge? We find no departure from these two rules by the trial Judge, and the exceptions are not sustained.

IX. Exc. 16. The admissibility of the testimony of Ayer depends upon whether it was proper rebutting testimony. The plaintiffs gave no testimony in the opening to show the value of the stumpage on the land within the crest of the mountain. The defendants' witnesses testified, basing their estimate of the value of the land per acre upon the stumpage, and the plaintiffs' offer in rebuttal was to show the amount of stumpage per acre, for the purpose of showing that the value of the stumpage, at the estimate put upon it by the defendants' witnesses, would make the value of the land per acre much more than the estimates as made by the witnesses for the defendants. Testimony of this character was not given by the plaintiffs in the opening and would directly meet and rebut the testimony of the defendants. This testimony, therefore, in rebuttal, should have been admitted.

X. Exc. 18. Charles T. Hall was called by the defendants and testified in chief to statements made by one Chamberlin in the presence and hearing of Homer Baker. The plaintiffs insisted upon the right to then cross-examine the witness upon the point of whether Homer Baker could hear or not. This right was denied, but he was afterwards cross-examined fully upon that point. It does not appear that the point was made, that whether he could hear or not, was a question for the court to determine, in the first instance, and the plaintiffs were not harmed by the denial of their claimed right to cross-examine, a right which was fully exercised at a later stage of the trial.

This is the only point relied upon under Exc. 18, and is not sustained.

XI. Exc. 19. The witness Kingsbury was asked how much land was cut off from lot 4 range 6 by a line run across the lot, assuming the double birches to be the south-west corner. The objection was that he had given only one corner and the answer would depend upon the witness knowing both corners. The testimony tended to show that he had surveyed the other corner, the south-east one, and the court held the witness was competent, and that question we will not revise.

XII. Exc. 20. The defendants' witness Kingsbury, did not testify in chief upon the question of whether the corner at which he began his survey was an original corner or not. The plaintiffs, therefore, had no right to cross-examine him in respect to whether it was an original corner. There was no denial of their right, to show it was not an original corner.

XIII. Exc. 22. Two rulings under this exception present the same question. The witness Kingsbury testified that he ran a line from the double birches, westerly 77 degrees, 20 minutes, west, and hit certain monuments; and that the line so run by him would strike the original town line at a point between lots 4 and 5 in Jay. The plaintiffs offered to show by Mr. Chamberlin that such a line run on the course stated, would strike the original line at a point further to the north than the point between lots 4 and 6. The court ruled that the witness not having run the line, was not competent to testify upon the question.

This ruling was correct. No doubt the witness could tell where it ought to strike the Richford line, but where it in fact would—never having run it—is another question, upon which no amount of experience would qualify him to speak.

The other two questions under exception 22 were excluded as not in rebuttal. There is nothing in the record that shows the rulings were erroneous.

XIV. Exc. 23, 24, 40, and 3rd exc. to the charge. The defendant Leavens testified and refreshed his recollection by

the aid of a letter written by him near the date of the occurrence to which his testimony related. The letter related to the same subject. The plaintiffs conceded that this was proper but objected to the use of the letter as confirmatory evidence and excepted to the charge of the court to the same effect. The law is too well settled in this State that such testimony is admissible and the charge of the court correct to be again brought under discussion. Private memoranda made by parties, and letters written concerning the subject matter, if contemporaneous, are regarded as auxiliatory to and confirmatory of the testimony of the witness.

XV. Exc. 25. There was no error in permitting the witness Sherman to state that he was notified by telegram, or by word from Mr. Miller, to meet the parties on the land in order to make an examination of it. It was a part of the arrangement by which they were to meet.

XVI. Exc. 26, 27. There was no error in the cross-examination of defendant Leavens. It was unnecessary for him to answer the question how the line, in the description of land in a deed, was described therein, the deed being then in the case as one of the exhibits. It was shown by the deed itself. *Res ipsa loquitur.* In regard to the other question he answered that the description of the line was shown by the deed, and the court ruled the question was essentially answered. The record does not show that the right of cross-examination was in any way abridged. What the plaintiffs required was already in the case and its repetition would give no added force to it.

XVII. Exc. 28. The original field book of the survey of the town of Jay was referred to by the witness Dewart. It was subsequently admitted for the purpose of contradicting him. In that there was no error.

XVIII. Exc. 29. After the examination of the defendant Leavens in regard to the knowledge he had of the land in question, its value and its boundaries, it was not error to

admit the deed in connection with his testimony. The jury could weigh his testimony better with than without it.

XIX. Exc. 30. The question asked of Mr. Leavens, how much the land had cost the estate at the time of the sale, was properly excluded as no part of the cross-examination. What the land had cost the Ewing estate was collateral to any issue on trial. If it had been a material issue, the plaintiffs could have called the witness and made the inquiry in the opening of their case.

XX. Exc. 31, 41. The questions asked of the witness Bowen in rebuttal were excluded as not proper rebuttal testimony. There was nothing disclosed by the record by which this court can say there was error in the ruling.

XXI. Exc. 32. This point is in substance considered under point VII.

XXII. Exc. 33. The plaintiffs' witness Bowen, in cross-examination, testified he told the surveyor, Kingsbury, that he, Bowen, understood the double birches marked one of the lot corners; that he supposed it was a corner where they stood, that he had no particular knowledge, but that it was the only corner he could ever find there.

It was not error in re-direct examination to exclude the question whether he had, or knew there was, doubt as to whether the double birches were the true corner or not. He had testified fully as to his knowledge,—said he had no particular knowledge upon the subject. It savored too much of refinement to examine him in respect to his doubts.

XXIII. Exc. 34. To show the value of the land as it was, it was not error to permit the defendants to show what it would cost to deliver the timber east of the crest of the mountains at North Troy. It was an element of the question in issue.

The question which the plaintiffs asked the witness, what it would cost to deliver it at another place, was no part of the cross-examination and its exclusion was not error.

XXIV. Exc. 35. The rule of damages as presented upon

trial was, "the difference in value between the land in question as represented, and as it actually was." The defendants, therefore, were properly permitted to show the value, and in connection with it, the average cut per acre of the land. This exception is overruled.

XXV. Exc. 36. The testimony of the witnesses Brown and Wood, called by defendants, was properly admitted. They made a count of the trees upon some parts of the lots and estimated the number on other parts. The objection is, that it, their knowledge, "was too vague and uncertain to be used as a basis for estimating the number of logs, or the number of logs it would take to make 1,000 feet of lumber."

No objection was made to their competency to speak upon such questions, but that their knowledge of the facts from which they spoke was too vague and uncertain. This went to the weight of their testimony, not its competency. If there was testimony before the trial court tending to show their competency, the ruling that they were competent will not be revised by this court.

XXVI. *Requests to charge.* Reqs. 1, 2, 3. The court was requested to charge that the deeds between the parties covered all the lands from the Canadian line to the crest of the mountain. The description in the deeds was by lot numbers, with no other description. Whether the lots conveyed embraced all the land from the line to the crest, was not a question of law, at least we cannot give the deeds the construction contended for. Whether in fact they did, would require the aid of extrinsic testimony and thus be a question for the jury, if it became material.

XXVII. Req. 4. No exception was taken to the refusal to comply with this request.

XXVIII. Reqs. 5, 6, 7. In regard to the 5th request, we construe it as relating simply to the matter of damages, in regard to lot 4 in range 7, and the rule which was asked for by the request was the general one stated by the court with reference to damages in the case, viz.: that the plaintiffs are

entitled to recover the difference in value of the land as represented and as in fact it was. The request was complied with.

Request 6 was properly denied. It was this: "That if the defendants honestly believed that the south line of lot 4 in range 7, was as their evidence tends to show, then if they knew it was in question or in dispute, and did not communicate that fact to the plaintiffs, but led them to believe that said lot was a full lot, it is no defense to this action." The gist of it was this, that "if they knew it was in question or in dispute" and did not communicate such fact to the plaintiffs, the plaintiffs would have a right to recover. The failure to communicate such fact to the plaintiffs would not bar the action but would be proper matter to consider upon the question whether the defendants had an honest belief upon that subject, whether their belief was in accordance with their representations when made. And the nature of the claim made would have an important bearing, for it might be a frivolous one, one that a prudent man would not consider for a moment. There was no legal obligation upon the defendants to communicate the fact to the plaintiffs, and that is the precise instruction called for by the request.

Request 7 presents the same question in regard to lot 4 in range 6, as has been considered under request 5.

XXIX. Reqs. 8, 9, 10. These requests relate solely to the right of recovery in case the plaintiffs knowingly made false representations. The charge upon this branch of the case was correct and in compliance with the requests.

Exceptions to the charge. Exc. 1. This was to the refusal to comply with the requests and has been considered.

Exc. 3. Has been considered under point XIV. in the evidence.

XXX. Exc. 4. The fourth exception to the charge is that the presiding judge did not comment on certain parts of the plaintiffs' testimony, particularly that of the witness

McGettrick and a cash book which was in evidence. The argument upon this point is that the court made the issue, to which the testimony related, prominent in the charge and pointed out minutely and in detail all the testimony tending to support Leavens, the defendants' witness, and utterly failed to point out the evidence in support of the plaintiffs' claim. Without considering if this be a just cause of exception or not, it is sufficient to say that the reason is not true in point of fact. There is no reference in the charge to any specific parts of the testimony on either side save to point out and instruct them that the letter (noted under point XIV. in the evidence) was not substantive testimony, but was in the case only as confirmatory of Leavens's testimony.

Exc. 5. This exception is not noticed in the plaintiffs' brief and is not considered.

Exc. 2, 6, 7 and 10. These points in relation to the charge we do not consider it beneficial to consider, as the judgment will be reversed on other grounds, and the same questions may not again arise.

XXXI. Exc. 8, 9. The 8th and 9th exceptions to the charge related to the subject of damages. The rule stated by the court was this: "The rule of damages in this case, if you come to the subject of damages, is the difference of what the land would have been worth had it been located and situated as represented and its value as it was in fact located." We think this stated the rule correctly. The plaintiffs did not complain that this was an erroneous statement of the doctrine, but submit that the illustration of it was error. There is nothing in the illustration that is inconsistent with the rule as stated and therefore, there was no error upon this point.

XXXII. Exc. 11. A plan was in evidence and in connection therewith a certificate from the clerk's office of an early survey. The certificate of the width and depth of the lots varied from the representation of the width and depth

of the lots as shown on the plan. In speaking of the discrepancy between the two, the court said: "I regard the certificate that these lots were laid out a certain width and a certain depth, as evidence less likely to be mistaken in respect to it than the lines upon the plan to indicate the shape of these lots." This was nothing but the expression of an opinion by the court, upon some of the testimony; it was in substance simply stating to the jury that the certificate might be regarded by them as of greater weight than the lots as shown by the lines upon the plan. It was a very proper caution and a correct one. It does not appear that they were controlled by this statement of the judge.

Judgment reversed and cause remanded.

The petition for a new trial is supported by the affidavits of eight jurors tending to show they misunderstood the charge; that such affidavits are inadmissible, to set aside a verdict, was held in *Sheldon* v. *Perkins*, 37 Vt. 550; *Tarbell* v. *Tarbell*, 60 Vt. 486; *Willey* v. *Carpenter*, 65 Vt. 168.

The petition is dismissed with costs.

CHARLES H. FERRY et al. *vs.* MILTIMORE ELASTIC STEEL CAR WHEEL COMPANY et al.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 27, 1899.

Foreign Judgment—Jurisdiction Presumed.—A declaration in debt upon a judgment of a court of superior common-law jurisdiction in a sister state is not to be held insufficient upon demurrer because it fails to show

that the court had jurisdiction of the subject matter or the parties, for jurisdiction is to be presumed, until the contrary is made to appear by plea or proof.

DEBT. Demurrer to the declaration. At the December term, 1897, Bennington county, *Taft*, J., presiding, a *pro-forma* judgment was rendered sustaining the demurrer and adjudging the declaration insufficient. The plaintiffs excepted.

F. G. Swinington for the plaintiffs.

Barber & Darling for the defendants.

TYLER, J. The declaration is in debt upon a judgment rendered by the circuit court of Cook county, Illinois, March 15, 1897. It alleges that the defendants are residents of this State, but it does not allege that they ever were residents of Illinois, nor that they were served with process summoning them to appear in said cause, nor that they appeared therein, nor that that court in any manner obtained jurisdiction of them, nor that it had jurisdiction of the subject matter of the suit. The case here stands upon a general demurrer to the declaration.

It is well settled by the decisions of this court and by those of the supreme court of the United States, that it is competent for a defendant to contradict and impeach the judgment of a court of another state by proof that that court had not jurisdiction of the matter in controversy, or that the judgment was rendered without the defendant's appearance or notice to him to appear. *Wood* v. *Augustins*, 70 Vt. 637; *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287. The defendant does not controvert this rule of law but contends that the question of jurisdiction cannot be raised by general demurrer.

It would be more in compliance with the requirement of the constitution of the United States, that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and with the

acts of Congress passed in pursuance thereof, and more in accord with the spirit of comity that exists between the courts of the different states, to presume that the Illinois court had proper jurisdiction until the contrary is shown by proof under a proper plea, than to require the plaintiff to allege these jurisdictional facts in his declaration.

We have been referred to no case decided by the United States supreme court and have found none which aids us upon this question of pleading. The cases go no further than to declare that under the constitution and laws of the United States a judgment or decree of one state, made by a court having jurisdiction of the parties and the subject matter, has the same force when pleaded or offered in evidence in the courts of any other state as in the state where it was rendered. *Cheever* v. *Wilson*, 9 Wall. 108: 19 L. C. P. Co. ed. 604; *Chew* v. *Brumagen*, 13 Wall. 497: 20 L. C. P. Co. ed. 663; *Mutual Life Ins. Co.* v. *Harris*, 97 U. S. 331: 24 L. C. P. Co. ed. 959.

In *Thompson* v. *Whitman*, 18 Wall. 457: 21 L. C. P. Co. ed. 897, it was held that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding. In that case, under a law of the state of New Jersey by which non-residents were prohibited from raking clams and oysters in the waters of that state, and two justices of the county in which the seizure of the vessel was made were authorized upon information to try and determine the case, it was held that it might be shown by parol evidence that the seizure was not made in the county where the prosecution was had.

It is laid down in the text in 11 Ency. Pl. and Pr. 1131, that the jurisdiction of a superior common-law court is presumed unless the contrary appears, and therefore in an action upon a judgment of such a court, although of a foreign or a sister state, it is not necessary to aver that such court had jurisdiction either of the subject matter or of the person. A large number of cases are cited in the notes as

sustaining this rule, among them *Wilbur* v. *Abbot*, 58 N. H. 272; *Mink* v. *Shaffer*, 124 Pa. St. 280; *Jarvis* v. *Robinson*, 21 Wis. 524. The rule in Massachusetts is that the record of the judgment of another state is *prima facie* evidence that the court had jurisdiction of the defendant, but that it is open to the defendant to prove that he did not appear in person or by attorney in the action in which the judgment was rendered. *Bissell* v. *Wheelock*, 11 Cush. 277; *Wright* v. *Andrews*, 130 Mass. 149.

In 12 Ency. Pl. and Pr. 173, it is stated as the general rule, "that nothing shall be intended to be out of the jurisdiction of courts of superior general jurisdiction but that which especially appears to be so; with such courts the record need not affirmatively show jurisdiction, and when silent upon the point, every intendment is in favor of their jurisdiction." The rule seems to have been deduced from decisions of courts of last resort in most of the states, though it has sometimes been held that the declaration must affirmatively allege jurisdiction. On page 186, same volume, it is stated that when the want of jurisdiction appears on the face of the record, the objection may be raised by demurrer, motion to dismiss or motion in arrest, but if the want of jurisdiction does not thus appear the objection should be taken by answer or plea in abatement. Under the practice in this State, however, a motion to dismiss is not available. *Marsh* v. *Graves*, 68 Vt. 400.

In *Fullerton* v. *Horton*, 11 Vt. 425, the action was debt upon a judgment of the court of common pleas, Middlesex county, Massachusetts. It appeared by the record that the defendant was set up as of Acton in that County, while the officer's return showed the attachment of certain lands in the county where he resided, and that a summons was left at his last and usual abode in Stowe in the same county. The defendant demurred for that the record did not show notice to him of the original action. It was held that, while the judgment might be inquired into under any proper plea,

a demurrer did not raise the question; that full faith, credit and effect must be given to the record, and that it did not appear that the court had not jurisdiction. The court remarked that if the defendant were to show that he did not then reside in Massachusetts, then notice to him should clearly and affirmatively appear, for "a resident of one state ought not to be subject to the jurisdiction of another, unless it affirmatively appear that he had notice." This is in accordance with the holding in *Galpin* v. *Page*, 18 Wall. 350, that: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Neither of the above cases makes against the general rule that the jurisdiction of the court of another state is presumed in the first instance, but is open to inquiry. In *Lapham* v. *Briggs*, 27 Vt. 34, and in *Price* v. *Hickok*, 39 Vt. 292, the objection was raised by plea. In *Prosser & Wife* v. *Warner*, 47 Vt. 667, oyer of the record having been obtained, and it being apparent that the supreme court of New York, which rendered the decree for alimony, had not jurisdiction of the person of the defendant, a demurrer was sustained.

The remarks of the court in *Price* v. *Hickok*, in substance, that a judgment of the court of another state rendered without notice to the defendant could not be enforced by action out of the state where it was rendered; that one state or nation has no right to thus give extra territorial effect to its laws and judicial proceedings and require another state to enforce them by action, are not opposed to the rule of pleading that such want of notice cannot be raised by demurrer when as in this case, it does not appear by the record that the court that rendered the judgment had not jurisdiction of the defendant.

The pro-forma judgment is reversed, demurrer overruled; declaration adjudged sufficient and cause remanded.

POWELL & POWELL *vs.* THE FIRST NATIONAL BANK OF CONCORD.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 27, 1899.

Agency.—The American Express Company was under contract with the defendant bank to have certain checks at Burlington, Vt., presented and protested. The company's agent at that point failing to understand the business, counsel for the bank in the presence of the president of the bank and the president of the company, telephoned to the agent to deliver the checks to the plaintiffs to be protested, but to understand that he was acting for the company and not for the bank. The agent delivered the checks to the plaintiffs, telling them that he did so by direction of the bank, and suggested that they take directions from the defendant through the telephone, which they did. *Held*, that for the plaintiffs' services in protesting the checks the defendant was not liable.

ASSUMPSIT. Trial by court, upon an agreed statement, at the March term, 1899, Chittenden county, *Taft*, C. J.,

presiding. *Pro-forma* judgment for the plaintiff. The defendant excepted.

Brown & Macomber for the defendant.

Powell & Powell pro se.

TYLER, J. The facts found by the trial court are, that the defendant entered into a contract with the American Express Co. by which the latter was to make collections of the checks which came into the defendant's hands drawn on the Burlington, Vt., banks, and to have them protested immediately when not paid on presentation; that on April 30, 1898, the defendant delivered a large number of checks to the Express Co. at Concord, N. H., which the Express Co. sent to Burlington where they arrived May 2, 1898. Payment being refused they were returned by Henderson, the Express Co's. agent at Burlington, without protest, to the Express Co's. agent at Concord, who at once returned them to Henderson with instructions to have them protested if dishonored. The Burlington banks had funds of the drawers with which to pay the checks, but they required the prior endorsements guaranteed, and the defendant's endorsement was made with a rubber stamp and not in writing; also, the checks were indorsed, "E. F. H., agent of the American Express Co.," the agent having no authority on file to endorse the checks, so the indorsements were regarded as irregular. There were other objections to a part of the checks, not necessary to state. After the checks were returned to Burlington and presented the second time and payment refused, Henderson telegraphed the facts to Mr. Pratt, the Express Co's. agent at Concord, who went to the defendant's president and informed him of the non-payment, and the two men went to the office of Mr. Streeter who was a director of the bank and its counsel. Streeter, at Pratt's request and in his presence and in the presence of the president, telephoned to Henderson in substance that the latter did not understand the business,

and that he had better place it in the hands of some one who did. Streeter inquired of Henderson about the plaintiffs and directed him to place the checks in their hands for protest if not paid. Henderson then placed the checks in the plaintiffs' hands, saying that he was directed by the defendant to hand the checks to them for protest. At Henderson's suggestion the plaintiffs took directions from the defendant through the telephone. The plaintiffs then performed the service, as they supposed, by the defendant's employment through Henderson, and their charges therefor were reasonable.

The trial court further found that the Express Co. was bound by its contract to perform the service rendered by the plaintiffs; that Henderson had no authority to employ the plaintiffs in the defendant's behalf and that the defendant's officers supposed that the plaintiffs were employed by the Express Co. and directed Henderson to so inform them; but whether Henderson so understood through the telephone the court was not able to find. In the conversation between Streeter and Henderson, the latter was told that he must understand that he was acting for the Express Co. and not for the bank, and after Henderson was directed to place the checks in the plaintiffs' hands for protest he was directed by Pratt by telegram to have the notary mail a notice to each drawer of the checks as well as to each endorser.

To enable the plaintiffs to recover they must have shown a direct employment by the defendant, or that the defendant had knowledge that they were performing beneficial service for it, and had reason to suppose that they expected it to pay for such service and acquiesced in the service being rendered. Benj. Prin. of Cont. 18; *Pew* v. *First National Bank*, 130 Mass. 391.

The case shows no employment of the plaintiffs by the defendant. If they were employed by any one, it was by Henderson, and it is expressly found that he had no authority to employ them in behalf of the defendant.

Whatever authority Henderson had he derived from Pratt through Streeter, and Henderson was told that he was acting for the Express Co. and not for the defendant.

The service rendered was valuable, not to the defendant, but to the Express Co. whose duty it was to have the checks protested. The officers of the bank had no knowledge that the plaintiffs were performing service in its behalf, nor were the circumstances such that they had reason to suppose that they were relying upon the bank for payment; on the contrary, the bank officials had reason to suppose that the plaintiffs were acting for the Express Co. and in reliance upon its paying them.

The fact that Henderson told the plaintiffs that he had been directed by the defendant to place the checks in their hands for protest is of no importance, it being found that he had not such authority; nor is it material, in view of the other facts found, that the plaintiffs supposed they were employed by Henderson for the defendant. The plaintiffs obtaining directions from the defendant in respect to the protest was entirely consistent with their employment by the Express Co. The plaintiffs do not bring their case within either rule stated; therefore

The pro-forma judgment is reversed and judgment rendered for the defendant.

ALBERT SOWLES *vs.* MUTUAL RESERVE FUND LIFE ASSOCIATION.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, THOMPSON, START and WATSON, JJ.

Opinion filed July 8, 1899.

Facts, not Legal Conclusions, to Be Pleaded.—The bill is insufficient in that it does not set forth the contract sufficiently to enable the court to determine whether the act of the defendant sought to be enjoined was in violation of the contract,—the allegation that the act complained of was in violation of the contract being only a conclusion of law.

CHANCERY. The cause came on for hearing upon demurrer to the bill at the September term, 1898, Franklin county, before *Tyler*, Chancellor, who rendered a *pro-forma* decree dismissing the bill. The orator appealed.

E. A. Sowles for the orator.

Charles M. Wilds, *Franklin R. Lawrence* and *George Burnham, Jr.*, for the defendant.

START, J. The complainant prays for specific performance of a contract, an accounting, and an injunction restraining the defendant from declaring his certificate of membership in the defendant association lapsed or forfeited. The allegations in the bill respecting the contract are, in effect, that the complainant, on the 4th day of April, 1892, made an application to the defendant for membership in its association; that the application was approved, and a certificate of membership in the sum of five thousand dollars, payable to Sarah P. Sowles, wife of the complainant, if living at the time of the complainant's death, otherwise to the executor or administrator of the complainant, was issued and forwarded to the complainant. The material breach of

the contract on the part of the defendant, as alleged in the bill, is an increase of the amount of the annual payments from one hundred eighty and ninety-hundredths dollars to two hundred ninety-three and forty-hundredths dollars, in violation of the contract.

The bill is insufficient, in that it does not set forth the contract sufficiently to enable the court to determine whether the act of the defendant was in violation of the contract. The certificate of membership in the defendant association is referred to in the bill, and, for the purposes of the hearing before this court, by agreement of counsel, it is treated as a part of the bill; but this does not enable the court to determine what the contract was. The certificate refers to the application and makes it a part of the contract, and the application contains an agreement, or warranty, on the part of the complainant, that the constitution or by-laws of the association, with the amendments then or thereafter made thereto, together with the application, shall be a part of the certificate, or policy, that may be issued on the application. The constitution or by-laws of the association are not set forth or referred to in the bill, nor are they produced in court. There is nothing before the court from which we can say that the increase in the amount of the annual payments was not authorized by the constitution or by-laws of the association or amendments thereto, nor from which the court can determine what the contract was respecting annual payments, for a claimed breach of which the complainant seeks relief. It is true that the complainant alleges that the increase in the amount of the annual payments was in violation of the contract, but this is only a conclusion of law and shows no ground for equitable relief.

The defendant's counsel contend that the courts of this State have no jurisdiction of the subject-matter of this action. A determination of this question will be seasonable when this court has before it a bill of complaint containing

sufficient allegations to constitute a cause of action over which the courts of this, or of some other, State have jurisdiction.

Decree affirmed and cause remanded.

ARTHUR W. WYATT *vs.* CHARLES H. HILL and E. C. EMMONS.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 28, 1899.

False Imprisonment.—The defendants took the plaintiff from his home to the court house, where they kept watch of him for a few hours, when he was taken by the jailer and kept in jail until two days later, when he was brought before the United States Commissioner on a warrant charging him with robbery of a post office. No evidence was produced and the plaintiff was set at liberty. Without deciding whether the defendants could under any circumstances be held for the damages that accrued to the plaintiff after he was taken by the jailer, it is held that they are not liable for any that accrued after he was taken on the warrant, it not appearing that they had from that time anything to do with the proceedings.

TRESPASS for false imprisonment. Trial by jury, at the December term, 1898, Windsor county, *Taft*, J., presiding. Verdict and judgment as stated in the opinion. The plaintiff excepted.

Gilbert A. Davis and *A. G. Cox* for the plaintiff.

J. C. Enright and *H. H. Blanchard* for the defendant.

START, J. The action is trespass for false imprisonment. The plaintiff's evidence tended to show, that, on the afternoon of May 28, 1895, the defendants came to his house in Taftsville and asked him if he wished to go with

them; that he got into the wagon and they drove to the court house in Woodstock; that they there kept watch of him until about four o'clock, when E. A. Thomas, the keeper of the jail at Woodstock, took him to the jail, where he was kept until May 30, 1895, when he was taken before United States Commissioner French, on a warrant issued by said French upon a complaint made out and sworn to by United States District Attorney Senter, charging the plaintiff with the robbery of a post office; and that no evidence was produced to sustain the charge, and the plaintiff was set at liberty. The court instructed the jury, that, if they found that the plaintiff was taken after his arrival at Woodstock, upon a warrant issued by United States Commissioner French, and was held upon the warrant thereafter, they might, in case they found a verdict for the plaintiff, assess the damages that the plaintiff sustained prior to the time he was taken under the warrant, and return a verdict for that sum as damages. The jury were further instructed that, if they found the plaintiff was so taken upon a warrant issued by Commissioner French, they would answer the following question, "What damage did the plaintiff sustain as a result of the acts complained of after he was taken upon the warrant issued by United States Commissioner French?" To this question, the jury answered, $96.66, and returned a general verdict for the plaintiff for $11.22 damages. The court rendered judgment on the general verdict, to which the plaintiff excepted, claiming that he was entitled to the amount named in the special finding. The plaintiff insists, in this court, that the court below should have rendered judgment on the verdict for the larger sum. Without deciding, whether or not the defendants could under any circumstances be held for the damages that accrued to the plaintiff after he was taken by the jailer Thomas, we hold that the plaintiff was not entitled to a judgment for the larger sum.

The warrant was not put in evidence, and there is nothing

in the exceptions that shows that the plaintiff was taken on the warrant issued by Commissioner French, prior to May 30, 1895, when the plaintiff was brought before the commissioner. The jury were instructed to assess the damages the plaintiff sustained prior to the time he was taken upon the warrant, and return a verdict for that sum as damages. Under this instruction, it not appearing that the plaintiff was taken on the warrant issued by the commissioner at an earlier date, it must be held that the jury assessed and returned a general verdict for the plaintiff to recover the damages sustained by him prior to the time he was taken before the commissioner on the warrant. As against the defendants, this was all the plaintiff was entitled to recover. There is nothing in the exceptions that tends to show that the defendants were responsible for the damage that accrued to the plaintiff after he was taken on the warrant issued by the commissioner, to answer unto a complaint by the district attorney, wherein he was charged with robbing a post office. It not appearing that the defendants had anything to do with the proceedings subsequent to the time the plaintiff was taken upon the warrant thus issued, or that they thereafter gave any directions, or exercised any control, respecting the prosecution or custody of the plaintiff, the charge, in so far as it appears from the exceptions, was correct; and error, in rendering judgment for the smaller sum, does not appear.

The plaintiff presented several requests for instructions to the jury as to what would constitute false imprisonment, and, in so far as the court did not comply with them, the plaintiff excepted. We have not been furnished with the charge upon the subject, except as is herein stated, and there is nothing before us from which we can say that the court did not comply with the requests to the extent the plaintiff was entitled to have them complied with. It is stated in the exceptions that the charge as to what would constitute

imprisonment and false imprisonment was satisfactory to the plaintiff and not excepted to. It would seem from this that there was a substantial compliance with the plaintiff's requests; but, for the reasons stated, we do not pass upon this question.

Judgment affirmed.

MARSHALL BROWN'S EXECUTOR *vs.* CHARLES HITCHCOCK.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START and WATSON, JJ.

Opinion filed July 28, 1899.

Statute of Limitations—Election.—The defendant promised to pay a sum stated or to allow the same to be applied in a certain manner, at the option of the promisee. The latter elected to make the application, but failed to do so through no fault of the defendant. Meantime the statute of limitations had run in favor of the obligation to pay on demand. *Held*, that the action was barred.

GENERAL and special assumpsit. Pleas, general issue, statute of limitations, and accord and satisfaction. Trial by jury at the September term, 1898, Rutland county, *Thompson*, J., presiding. Verdict and judgment for the plaintiff under *pro-forma* rulings. The defendant excepted.

Silas E. Evarts and *Joel C. Baker* for the defendant.

Butler & Moloney and *J. B. McCormick* for the plaintiffs.

START, J. The plaintiff seeks to recover on three instruments executed by the defendant to the plaintiff's testate. The first, dated August 8, 1873, is as follows: "I, Charles Hitchcock, have received of Marshall Brown, as executor of the will of Robert H. Smith, late of Pawlet, Vt., deceased, four hundred and fifty dollars, which I agree to pay to him

on demand, with interest annually at the rate of seven per cent. per annum from this date, or to allow and apply the same to him in the settlement or division of the real estate of said Robert H. Smith, or out of the avails and proceeds thereof when sold, or of my share thereof, as said Brown may hereafter elect, with interest on the same annually at the rate of seven per cent. per annum." The other two instruments differ from the first only in amount and date. The plaintiff claimed, and his evidence tended to show, that Marshall Brown, within six years after the execution and delivery of the instruments, elected to take his pay out of the real estate, or the proceeds thereof, and notified the defendant of his election.

The court instructed the jury, that, if Marshall Brown, within six years from the execution and delivery of the instruments, elected to take his pay out of the avails or proceeds arising from the sale of the real estate mentioned in the instruments, pursuant to the option given him in the instruments, and notified the defendant of his election, the plaintiff was entitled to recover. By this instruction, the defendant's liability was made to depend upon whether Brown made his election within six years after the execution and delivery of the instruments, and gave notice thereof to the defendant. This is not the test of the defendant's liability. The right of action upon the defendant's promise to pay the sums specified in the instruments, on demand, was not available to Brown after he had made his election and given notice thereof to the defendant. The only other undertaking of the defendant was to allow Brown to apply the defendant's share in the real estate, or the proceeds thereof when sold, in payment of the sums of money named in the several instruments; and the defendant's liability depended upon whether there had been a breach of this agreement on his part. Brown could not, by electing to take his pay out of the real estate, or the proceeds thereof, and giving notice of his election, fix a personal liability

upon the defendant. In case of such an election, the defendant was not, by the terms of the instruments, to pay anything personally. Brown was to take his pay out of an estate which he was administering, and, unless the defendant prevented him from doing so, or there was, in some other way, a failure to receive his pay out of the defendant's share in the estate, through the fault of the defendant, there was no breach of this contract, which Brown had elected to rely upon. Brown having elected to take his pay out of the real estate, or the proceeds thereof, and having given notice of his election to the defendant, the defendant's liability, under the pleadings, depended upon whether, within six years before the commencement of the suit, there had been a breach of the alternative promise which Brown had elected to rely upon, on the part of the defendant. Such was, in effect, the holding when this case was before this court on the pleadings. *Brown's Executor* v. *Hitchcock*, 69 Vt. 197. In view of this holding, it is unnecessary to decide the other questions argued by counsel.

Judgment reversed and cause remanded.

AMOS W. MOODY *vs.* THE TOWN OF BRISTOL.

May Term, 1899.

Present: TAFT, C. J., ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 28, 1899.

Acts 1896, No. 73—Liability of Town for Want of Railing.—The want of a guard or railing at a dangerous place on a highway, other than a bridge or culvert, does not constitute an insufficiency under V. S. c. 152, rendering the town liable to travelers for damages occasioned thereby.

Construction of Statute.—Acts 1896, No. 73, requiring such guards to be erected and maintained by towns, is made by its second section a part

of c. 152 for the purpose not of making towns liable to travelers but of ensuring the erection of guards by other methods included in that chapter, such as indictment and fine.

Construction of Statute.—If the legislature had intended to impose a general liability upon towns, it would have used more apt language than merely to make the provision a part of a chapter containing among other things a liability provision.

CASE for injury upon a highway through want of railing at a dangerous place not a bridge or culvert. Heard upon demurrer to the declaration, in Addision county. A *pro-forma* judgment was rendered sustaining the demurrer and adjudging the declaration insufficient. The plaintiff excepted.

No copy of the bill of exceptions was filed with the reporter.

Button & Button for the plaintiff.

W. W. Rider and *C. M. Wilds* for the defendant.

START, J. The action is for the recovery of damages sustained by the plaintiff by reason of the defendant's neglect to maintain a guard or railing at a dangerous place on one of its highways. The plaintiff contends that the action is authorized by No. 73 of the Acts of 1896. Section 1 of this act makes it the duty of every town and city to erect and maintain in all dangerous places on its public highways suitable guards or railings to protect travellers from accident by running over or down embankments, and, by § 2, the act is subject to the provisions of chapter 152 of the Vermont Statutes. This chapter provides, that, when a highway or bridge is out of repair or unsafe for travel, the county road commissioners may order it repaired; and, if the town neglects to comply with such order, the commissioners may cause the repairs to be made at the expense of the town. It also provides, that, when a town, liable to keep in repair a highway or bridge, fails so to do, it may be indicted for such neglect, by the grand jury of the county, and may be fined at the discretion of the court;

and the fine so assessed shall be expended in repairing the highway or bridge, under the direction of a commissioner appointed by the court. It is further provided in this chapter, that, if damage occurs to a person, or his property, by reason of the insufficiency or want of repair of any bridge or culvert which the town is liable to keep in repair, the person sustaining damage may recover the same in an action on the case.

It is obvious that the purpose of the enactment of 1896 was to point out more clearly and particularly the duty already resting upon towns by general enactments to keep their highways and bridges reasonably safe for travel thereon, and that the want of a guard or railing at dangerous places to protect travellers from running over embankments was such an insufficiency and want of repair as would make it the duty of the county road commissioners to take action and require guards or railings to be erected, and would justify the county grand jury in indicting a town, and the court in assessing a fine and causing it to be expended for the purpose of making such places reasonably safe for travel; and we think the act was made subject to chapter 152 to ensure the erection of guards or railings at such dangerous places, and not for the purpose of giving a right of action in favor of a person sustaining damage by reason of the neglect of a town to erect and maintain such guards or railings. Chapter 152 does not impose a general liability upon towns to persons sustaining damage by reason of the insufficiency of highways. The liability is limited to those damages which arise from the insufficiences of bridges and culverts, but its provisions relating to repairing such insufficiences are general and relate to all highways. So, also, are the provisions of the act of 1896. They relate to dangerous embankments upon all highways and are consistent, and in harmony with, those provisions of chapter 152 which relate to the power of county road commissioners and county courts to compel repairs upon all

highways; and, by making the act subject to the provisions of chapter 152, it was intended to make it subject to those provisions relating to repairs upon all highways and bridges, and thereby secure a better enforcement of its provisions. Towns and other municipal corporations created for governmental purposes are not liable to a private action for neglect to keep their highways in repair, or for the neglect of their officers in this respect, unless such liability is expressly imposed by statute. *Baxter* v. *Winooski Turnpike Co.*, 22 Vt. 114; *Daniels* v. *Hathaway*, 65 Vt. 247. If the legislature had intended to impose such a general liability upon towns as is contended for by the plaintiff, it would have used more apt words for that purpose. We, therefore, hold that an additional liability on the part of towns to persons sustaining damage by reason of the insufficiency and want of repair of highways is not imposed by the act of 1896.

Judgment affirmed.

STATE *vs.* VOLNEY NEWELL.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed July 28, 1899.

Respondent's Appeal to County Court, when May Be Entered.—A respondent who has appealed to the county court from the judgment and sentence of a justice, may enter his appeal on the first day of the term as matter of right, or may enter it at any later day during the term if the court in its discretion will permit him; and he has a legal right to have the court exercise its discretion. To refuse as matter of law to entertain his appeal is error.

COMPLAINT for intoxication. Heard on motion of the

respondent to be allowed to enter his appeal at the March term, 1899, Chittenden county, *Taft*, C. J., presiding. Motion denied. The respondent excepted.

V. A. Bullard for the respondent.

R. E. Brown, State's Attorney, for the State.

START, J. The respondent was convicted of the crime of intoxication before the Burlington city court and sentenced to pay a fine and costs of prosecution, and thereupon took an appeal to the March term, 1899, of the Chittenden county court. The court convened on the 8th day of March, 1899, and, on the 18th day of March, 1899, the respondent asked leave to enter his appeal. The court ruled that the appeal should have been entered on the first day of the term, and, as a matter of law, denied the respondent's motion. As we construe the exceptions, the court below ruled, as a matter of law, that the appeal could not be entered after the first day of the term. This was error. On the first day of the term, the respondent could enter his appeal as a matter of right, and the court, in its discretion, could have allowed him to do so at any time thereafter during the term. *Bennet* v. *Whitney*, 1 Tyler 59; *Miller* v. *Goold*, 2 Tyler 405. The respondent has a right to have the court below exercise its discretion and say whether, under the circumstances, he ought to be allowed to enter his appeal; and, for this purpose, the cause must be remanded. *Johnson* v. *Shumway*, 65 Vt. 389; *Ranney* v. *St. J. & L. C. R. R. Co.*, 67 Vt. 594.

Exceptions sustained and cause remanded.

THE SILLS STOVE WORKS *vs.* CHARLES H. BROWN.

May Term, 1899.

Present: ROWELL, TYLER, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed August 12, 1899.

Deceit—Evidence.—The defendant gave the plaintiff a written statement of the assets and liabilities of the defendant's firm as a basis of present and future credit, and promised therein to advise the plaintiff of any material change. The declaration alleged that in giving the firm credit, then and from time to time thereafter, the plaintiff relied upon the writing. *Held*, that the plaintiff was not entitled to prove subsequent oral statements of the same tenor as a basis of recovery.

Deceit—Evidence.—Whether such oral statements would have been admissible as throwing light on the defendant's purpose in making the written statement, is not considered.

Deceit—Evidence—As the written statement related solely to the financial condition of the firm, evidence tending to show the defendant's individual indebtedness on that date and afterwards was irrevelant.

Evidence—Plaintiff Bound by Declaration.—The action having been brought upon the ground that there was a partnership and that the defendant made false representations concerning it, the plaintiff was not entitled to prove that there was no partnership and that the property represented as belonging to the firm belonged to the defendant individually.

Evidence—What an Offer Must Show.—The plaintiff offered the records of the court of insolvency to show certain things, but the case does not disclose whether the records would have supported the offer; hence it cannot be held that they were improperly excluded.

Evidence.—Moreover in the present instance the offer was to show matters which the records of the court of insolvency would not properly contain and which, therefore, it is to be presumed they did not contain; but if they had contained them they would not have been evidence.

Evidence—Intent to Deceive.—If one gives another a written statement of his resources as the basis of present and future credit, and therein promises to advise of any material change, the statement is not such a continuous obligation that the failure to keep the creditor advised must be treated as an intention to deceive,—the test being whether there was an intent to deceive when the written statement was made.

CASE for deceit. Trial by jury, at the December term,

1898, Windsor county, *Taft*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

With reference to the fourth point in the opinion, it appeared that the defendant had afterwards given a mortgage upon the property covered by the statement, and the plaintiff requested the court to charge that the written statement "made a continuous obligation on the part of the defendant which if he did not perform it, should be treated as intended to deceive the plaintiff," but the court declined to so charge, instructing the jury that the real question was whether the defendant had intended at the time he made the written statement to deceive the plaintiff and did not at that time intend to notify them of any such change.

Pingree & Pingree for the plaintiff.

Hunton & Stickney for the defendant.

TYLER, J. The plaintiff was a manufacturer of and wholesale dealer in stoves and ranges. The defendant was a member of the firm of C. H. Brown & Co., composed of himself and his wife, Jennie A., engaged in retail trade at White River Junction in this State. C. H. Brown & Co. had bought goods of the plaintiff prior to February 3, 1896, and on that day, for the purpose of obtaining credit with the plaintiff, it made and delivered to the plaintiff a statement of its assets and liabilities as follows: "C. H. Brown & Co., of . . . for the purpose of obtaining a credit with Sills Stove Works, Rochester, N. Y., for goods which we may now or hereafter purchase of them, do make the following statement and representation of our present true total assets and liabilities, which representation shall be the basis of our credit with Sills Stove Works, both for the present purchase and for all purchases made hereafter, agreeing to immediately notify them of any material change in our business matters. In case of failure or insolvency, it is agreed that all notes or accounts shall be considered then due.

"We are a co-partnership of Charles H. Brown and Jennie A. Brown.

"We own assets and owe debts as follows"—giving assets amounting to $9,950, and liabilities, $4,300, with signature of firm and of individual members.

It is alleged in the declaration that the plaintiff relied upon the statements contained in the writing and that so relying, on the day of its date and thereafter from time to time down to August 5, 1897, it sold and delivered merchandise to the defendant's firm and took its promissory notes therefor; that those statements were false and were made with intent to deceive and defraud the plaintiff; that the plaintiff was unable to collect payment of the notes, except in part, and was damnified. There is no averment of subsequent oral statements of a similar kind.

The plaintiff's evidence tended to show that on August 5, 1897, the business of the defendant's firm was closed by attachments and that the defendant's voluntary insolvency followed a few weeks afterwards.

The main question at the trial was, for what purpose the writing was made,—whether to express the defendant's belief in respect to his firm's financial condition, or, having knowledge of its insolvency, with intent to deceive and fraudulently obtain credit.

(1) The plaintiff offered evidence tending to show that on various occasions, especially in March, May, June and August, 1897, when the defendant gave the plaintiff's traveling salesman orders for goods, he in substance repeated to him the statements contained in the writing of February 3, 1896, which evidence was excluded. The case states that the testimony offered tended to show that all the goods sold to the defendant were sold solely in reliance upon the statements contained in the writing and upon substantially the same statements orally made from time to time thereafter as goods were sold, and as tending to show a fraudulent intent from the time the statements were first

made; and further, that it was for the purpose aforesaid and in view of the continuous nature of the representations made on the occasions when orders were taken and filled.

There was no error in the exclusion of this evidence, for the declaration counts only upon the written statements, and there could be no recovery in consequence of their repetition or continuous character. It is needless to consider whether subsequent oral statements of a like character were admissible to throw light upon the defendant's purpose in making the writing; the evidence was not offered for that purpose.

(2) As the writing of February 3, 1896, related solely to the financial condition of the firm, the evidence offered tending to show the defendant's individual indebtedness on that date and its continuance was irrelevant and properly excluded.

(3) The plaintiff offered the records of the court of insolvency to show that defendant, in his schedule of assets, treated the property in the store as his own (which he had included in the statement to the plaintiff as the property of C. H. Brown & Co.) as tending to show, together with the said chattel mortgage to Mrs. Daley, that the claim of February 3, 1896, that there was a partnership, was false and that the property was in fact the defendant's private property, while the firm owned none of it, and that all the bills nominally due C. H. Brown & Co. were treated by defendant and were in fact his property; also as tending to show that the real estate which he had represented to be the firm's stood in his name and was always treated as his own, and that no transfer or change was ever made of this property from the firm to any one after the said representations were made, this tending to show that it was defendant's from the first, which offer was rejected.

It is not alleged in the declaration that there was no partnership; on the contrary, the action is brought upon the ground that there was a partnership and that the defendant made false representations concerning it.

The case does not state that the records would have shown the fact that the defendant scheduled the property as his own and not as the firm's. The offer was too broad, for it could not have appeared by the insolvency records that the real estate, which the defendant had represented to be the firm's, stood in his name, that it had always been treated as his, and that it had never been transferred by the firm to any one after the representations were made. The records must be presumed to have contained only the matters which they ought to have contained. If the records had contained the matters alleged they would not have been competent evidence. Some of the matters could only have been shown by deeds or the records thereof.

(4) There was no error in the charge upon the view of the case above indicated. The instruction in respect to the mortgage given by the defendant on the stock and his neglect to notify the plaintiff was as favorable to it as the evidence warranted.

Judgment affirmed.

JESSIE FRASER *vs.* THE HOME LIFE INSURANCE COMPANY.

May Term, 1899.

Present: TAFT, C. J., ROWELL, MUNSON, START, THOMPSON and WATSON, JJ.

Opinion filed August 15, 1899.

Insurance.—After premiums are received by an insurance company it is too late for it to raise any question as to the form of the receipts or the authority of the agent to receive them.

Agent Held to Mean Local Agent—General Agent is Company's alter ego.—The clause in the insurance contract that "no agent has power on behalf of the company to extend the time for paying a premium," refers to local agents, not to general agents, and the latter are presumed to possess authority to transact the business of the company generally, certainly such as relates to the procurement and continuance of risks.

Insured May Assume that General Agent Has Authority to Extend.—Even if a general agent have in fact no authority from the company to extend the time for payment of premiums, the insured may assume that he has, unless he knows, or from the circumstances ought to know, the contrary.

Inference from Course of Trial Below.—From the fact that the trial court did not submit to the jury to find whether the general agent had in fact authority from the company to extend the time of payment, this court infers that there was no evidence tending to show that the insured had knowledge or notice of such lack of authority if it existed.

Insurance—Forfeiture for Non-payment of Premium.—Under a policy which provides that it shall become void upon non-payment of a premium the company is not bound, in case of non-payment, to take any action whatever to work the forfeiture.

Insurance—Forfeiture for Non-payment of Premium.—In the present case the court erred in submitting to the jury the question whether the insured was justified by the conduct of the company in believing his policy remained in force without the payment of the premium, for there was no testimony tending to show that he held, or would have been justified in holding such a belief.

Insurance—Forfeiture for Non-payment of Premium.—The fact that a company accepts one premium after it has become due and the policy forfeited, may justify the holder in believing that the company would accept another premium under like circumstances, but would not justify him in believing that his policy would remain in force whether he paid the premium or not.

Evidence.—A notice sent by the company to the insured that the next regular premium will fall due on a day stated "if such policy is in force on that day," is not, under the circumstances of the present case, evidence that the company regarded the policy as in force.

Case Distinguished.—This case is to be distinguished from such as hold that after a policy has become forfeited, the company may waive the forfeiture by levying or suing to collect assessments upon premium notes, for here the insured had given no notes and was under no obligation to pay the premium.

ASSUMPSIT upon a policy of life insurance. Trial by jury, September term, 1897, Washington county, *Tyler*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

Dillingham, Huse & Howland for the defendant.

J. W. Gordon and *Richard A. Hoar* for the plaintiff.

TAFT, C. J. The plaintiff seeks to recover the amount of an insurance policy upon the life of her husband, for the sum

of $2,000. The policy was dated 27 July, 1891. The premiums were payable quarterly, and all premiums to and including the one due 27 July, 1894, were paid. Upon trial the only question in issue was whether the policy had become forfeited by non-payment of the premium due 27 October, 1894. The first premium was due when the policy issued, and its payment was required in advance.

The application was made a part of the policy and therein it was stated that a note for the first premium would accompany the application. The record does not show what became of the note, but it is fair to infer that it was paid at maturity. Upon what time it was given does not appear but we fail to see how that can be material. After the first premium, the quarterly premiums matured on the 27th days of October, January, April and July. It becomes material to inquire when the respective premiums were paid.

There were twelve renewal premiums paid. It is not shown when those maturing 27 January, 1892 and 1893 were paid; therefore, no inference can be drawn against the defendant by reason of their having been paid when overdue, as that fact does not appear. Of the other ten premiums, two were paid when due; another was paid, when due, by the agent, who paid the company and took the insured's note for it, and the note was paid when one day overdue; two were paid when one day, three when two days, and one, eleven days after maturity. The payment of the last quarterly renewal, 27 July, 1894, was extended to 6 September, 1894, and interest paid for such extension, and payment made four days after the time of extension expired.

It may well be contended that, with one exception, all the premiums were paid when due. As above stated, it does not appear when two were paid, and it is fair to infer they were paid when due. The note which was given for one was paid before maturity. The premium, the payment of which was extended to 6 September, 1894, was paid—it does

not appear when. The receipt was dated the tenth, but payments were generally made by check deposited in the post office at Barre, and it was generally one or more days before the checks were received in New York and receipts given. Such was evidently the case in respect to the five premiums paid one and two days after they fell due. There was but one other premium and that was paid eleven days after its maturity.

This brings us to the consideration of the quarterly premium which became due 27 October, 1894, and which it is conceded has never been paid. The general agent, Mr. Carpenter, wrote the insured 7 November, 1894, in regard to the premium, then eleven days past due, and two days later, the insured wrote Mr. Carpenter (defendant's Ex. 10,) "I find money hard to collect. I enclose you 20 cents in postage stamps to extend time on my policy for a month or so till I get the money to send you. Hope this will be all satisfactory." In reply to this Mr. Carpenter wrote, under date of 12 November, 1894, "Your favor of the 9th inst. with 12 cents interest for extension is at hand. This will continue the policy in force until the 27th November, at which time I trust you will be able to meet the premium, but if not, be sure and let me know before the 27th, that I may be enabled to take care of it for you."

The testimony of Carpenter tends to show that nothing further was ever done by the insured, and that he never heard from the insured again upon the subject. The plaintiff's testimony tended to show that the agent Carpenter extended the time of payment of the October, 1894 premium to 27 December, 1894, the insured dying on the 25th of that month.

On the 17th December, 1894, the defendant sent the insured a notice that a quarterly annual premium on the policy would become due and payable on the 27th January, 1895, if such policy was in force on that day. These are the material facts in the case which it is necessary for us to consider.

It was a part of the contract that in case of non-payment of a premium the policy should be void, and in that case all payments previously made should be forfeited to the company, save in certain excepted cases which it is unnecessary to consider in the case before us.

(1) The various exceptions taken to the testimony in regard to the regularity of the receipts of the premiums, the authority of the agent Carpenter to waive any condition of the settlement, whether the officer signing the receipts was duly authorized to sign them, whether the receipts were in due form, or duly issued, are not tenable; they become immaterial in view of the fact that the premiums were all paid to, and received by, the company. After the premiums were received by the company, it is too late for them to raise any question of the form of the receipts, or the authority of the agent to receive them. The receipts were offered only upon the question of the forfeiture, and the waiver of the payment of the premium in question, and their pertinency upon these questions is hereafter considered.

(2) The plaintiff conceded that the premium due 27 October, 1894, had not been paid, and that she could not recover the full amount of the policy unless she established the fact that the company, by an express agreement, by its agent Carpenter, extended the time of the payment of the October premium until 27 December, 1894, or that the action of the defendant company was such that the insured Fraser might reasonably believe and did believe that the time for its payment had been extended or waived.

There was testimony in the case tending to establish the plaintiff's claim that the time of payment of the premium due 27 October, 1894, had been extended to 27 December, 1894, and interest paid for the two months' extension. The plaintiff testified she had seen a letter from the agent Carpenter to the insured informing the latter that he had sent all the interest and that the time of paying the premium had been extended to 27 December, 1894.

The defendant insists that the letter referred to by the plaintiff was plaintiff's Ex. O. which continued the policy in force until 27 November, 1894, but this question was for the jury.

If the company extended the time in which to pay the premium from the day it became due, 27 October, 1894, for two months, until 27 December, 1894, it cannot now be heard to say that the policy was void for the reason that the premium had not been paid; it could not say there was a forfeiture, for there was none, and the plaintiff can recover. This question was made upon the trial below and fairly submitted to the jury. It was a part of the contract that "No agent has power on behalf of the company . . . to extend the time for paying a premium" etc. The company invoke the aid of this clause and claim that Carpenter had no power to extend the time to pay the premium,—that the company alone could do that.

We hold that the words, "no agent," in the clause referred to mean a local agent, and have no reference to a general agent. Carpenter was a general agent and had supervision over a territory larger than Vermont, and as was said in *Carrigan* v. *Insurance Co.*, 53 Vt. 418, "a general agent, in absence of proof to the contrary, is presumed to possess authority to transact the business of the company generally," certainly such business as relates to the procurement and continuance of risks. He was the company's *alter ego.*

The further claim is made that in fact he had no power to extend the time of the payment of a premium, and the defendant gave testimony tending to show such fact.

The fact that he had no such power would not bind the insured unless the latter had knowledge of it, or ought to have known it from such facts as were within his knowledge. It does not appear that there was any testimony in the case tending to show such knowledge on the part of the insured, nor that he ought to have known that Carpenter had no such power. From the fact that the question whether

Carpenter had such power or not, was not submitted to the jury we must infer there was no testimony in the case tending to show knowledge of such fact on the part of the insured.

Had the question of whether the time of payment of the unpaid premium been extended by an express agreement between Carpenter and the insured, been the only question submitted to the jury, the judgment on the verdict could not be disturbed.

(3) The jury may have found, that there was no agreement to extend the time, but have returned a verdict upon the other question submitted, viz.: the court after submitting the question of whether there was a special agreement to extend the time of payment, said, "if there was not an actual extension of the time of payment, was the course of conduct of the company such as might reasonably induce the belief in the mind of Mr. Fraser that the time had been extended, and was he so induced to believe," and further, "if there was not a definite extension of the time, did the company so act in relation to it, as evidenced by this correspondence that took place—I think all the evidence bearing on the question was by correspondence —was the action of the company such that the insured, Mr. Fraser, might reasonably believe and did believe that the time had been extended?" and further, "it was the right of the company to declare this policy forfeited and void on the failure of the insured to pay this October premium, but if the company elected to let the policy remain in force, to keep it on foot and attempt from time to time to make collection of the overdue premium, it would not be the right of the company afterwards, either before the death of the insured or afterwards, to consider and treat the policy as having lapsed or become void on October, 1894. The company must have made its decision when this payment was due and unpaid. It was its duty to make its decision then, whether to treat the policy as void or let it run along and try to collect the overdue premium."

Upon non-payment of the October premium if the time of payment was not extended, the policy was void and forfeited, as hereinbefore stated. The court recognized the fact and said, "the condition that the premium should be paid when due was a proper condition, at all events it was assented to by the insured." The company was under no obligation to declare the policy void in order to avail itself of the forfeiture. The court erred when it said: "The company must have made its decision when this payment was due and unpaid. It was its duty to make its decision then, whether to treat the policy as void or let it run along and try to collect the overdue premium." There was no testimony in the case tending to show an election on the part of the company to let the policy run and try to collect the overdue premium. The insured was under no obligation to pay the premium and the defendant had no power to collect it. All the testimony in the case upon this point is in the record; it is contained as the trial judge said in the correspondence between the insured and the general agent Carpenter. The letters may be scanned in vain for anything tending to show that the insured believed his policy was in force unless he paid the premium or that would justify him in so believing. On the contrary the correspondence indicates knowledge on his part that the premium must be paid in order to continue the policy in life. He asks in January of the last year to give a note for the premium. The premium due 27 April, 1894, was not paid until 7 May, 1894, paid admittedly, ten days after maturity; but in the letter enclosing the pay he apologizes for the delay and expresses the hope that his payment will be all O. K. This does not indicate a belief that his policy was in force, if the premium was not paid. For the July premium he gets an extension of time in which to pay. What necessity would occur to him to have the time extended, if the policy was in force whether the premium was paid or not? In regard to the last premium which fell due before his death—the

premium which it is conceded was never paid—he applies to have the time extended and it is done and he is informed that the payment of the twelve cents interest continued the policy in force until the 27th November, 1894, and if unable to meet the premium then he is warned to let the agent know so he could take care of it for him.

Is it not far-fetched to say that he believed or was justified in believing that his policy was kept in force although the premiums were unpaid? Was he justified in believing that the premium would take care of itself? Was he justified in believing that it made no difference whether he paid the premium or not, when Carpenter wrote him, "I trust you will be able to meet the premium, but if not, be sure and let me know before the 27th, that I may be enabled to take care of it for you?"

The effect of the non-payment of the premium was to render the policy null, and it so continued until the company by receiving the past due premium waived the forfeiture and restored the policy to life,—in other words, revived it.

The very terms of the renewal receipts indicate that this is the construction to be placed upon the contract, viz.: "It is hereby stipulated by the holder of the policy herein named, that if any payment of premium is received on said policy, after the same has become due, it is on the condition that the party whose life is thereby insured is at the time in good health, and if the fact is otherwise, the policy shall not be revived by such payment."

Had the insured a right to understand that his policy was still in life? It is a dead policy that is revived, not a living one.

The fact that a company accepts a premium after it has become due and the policy is forfeited may justify the policy holder in believing that thereafter the company would accept a premium under like circumstances. The policy-holder might have the right even to compel the company to accept the premium if such had been their course of business,

—provided the party whose life was insured by the policy was at the time in good health; but it would not justify him in the belief that his policy was in force whether he paid the premium or not. To so hold would render such a construction of contracts as odious as it is said forfeitures are regarded.

The only testimony in the case upon the last question submitted was that tending to show that premiums had been received a short time after they matured and exhibit "P." Under objection and exception, Plaintiff's Ex. P. was put in evidence as tending to show that the company regarded the policy as in force. It was a notice dated 17 December, 1894, that a quarterly annual premium would beeome due on the policy in question 27 January, 1895, "if such policy is in force on that day." The company were under a statutory liability to notify every policy holder of the time a premium on his policy became due, and were obliged to notify him not less than fifteen, nor more than forty-five days, before the premium fell due.

The premium receipts were in the hands of the agents, and whether the policies had lapsed could only be learned by specific inquiry as to each one. To avoid any liability under the statute, and to comply with the law, the only course open to the defendants was to send notices; and to protect themselves in so doing, there was inserted in the notice that the premium would be due on the day named, the condition, "if such policy is in force on that day." The policy may have already lapsed; it might lapse any day after the notice, and if then lapsed it might be revived. There is in the notice itself, a clause from which it may fairly be inferred that the company did not know whether the policy was in force or not, viz.: "This notice is not intended to vitiate any claim for paid up insurance provided for in said policy." After three years the insured was entitled to a paid up policy for $300. The notice was in substance: "We do not know whether this policy, on the day named, will be in force, or

not, but if it is, a premium will be due at that time. But this notice is not intended to vitiate any claim you may have for paid up insurance." It was only in case of a default in the payment of a premium, and the policy becoming null, that a policy holder was entitled to a paid up policy. This exhibit was not admissible to show that the company regarded the policy in force. In connection with the other facts in the case it is not capable of such construction.

There are cases in which it has been held that after a policy of insurance becomes forfeited, and the company levies assessments upon it or brings suit to collect the assessments, it cannot insist upon a forfeiture, but such cases are those in which the company holds the premium notes of the insured, with the right to assess them, and to collect the assessments. Under such circumstances if the company assesses the notes and collects the assessments, it cannot defeat an action to recover a loss under the policy, upon the ground that the policy was null. It cannot say, at the same time, that the policy was in force for the purposes of assessment, and null to defeat a recovery for a loss.

In the case before us there was no obligation upon the insured to pay anything, and no right in the defendant to compel payment. There is a wide distinction between this case and those referred to. A case somewhat analogous to this, and in its features nearer like it than any other to be found in our reports, is *Tripp* v. *Ins. Co.*, 55 Vt. 100. In that case the jury by special verdict found an agreement to waive payment of the premium which was overdue when the insured died. There was no evidence of a special agreement, but the case was submitted "upon the intercourse, the business communications, the business relations between the defendant and Chapman," the insured, to find whether there was an agreement to waive the payment of the premium when due. Whether the evidence in the case

supported the special finding, was a question not made in the case. We infer that it did, and that there was testimony besides that showing the receipts of the premiums after their maturity. The special finding based upon legitimate evidence, warranted the judgment for the plaintiff. The case was twice argued, and on the first hearing, the late *Veazey*, J., saying a judgment for the plaintiff was a legal fraud, the judges save one were for a reversal of the judgment, but upon a re-argument before all the judges, a majority of those sitting, being a minority of the court, ordered an affirmance.

In the case at bar the only testimony upon the last point submitted, was that tending to show the receipts of the premiums a short time, from one to eleven days after maturity, with plaintiff's Ex. P. This testimony did not tend to show that the policy was in force during the time the matured premiums were unpaid, and until it was revived by the receipt of the overdue premiums. Upon the testimony in the case, the last question submitted should have been excluded from the consideration of the jury. The only question proper for their consideration was whether there was an express agreement to extend the time of payment of the October, 1894, premium to 27 December, 1894.

Judgment reversed and cause remanded.

RE NATIONAL GUARD OF VERMONT.

No. 5 of the Acts of the Extra Session of 1898, providing that the First Regiment, National Guard of Vermont, volunteering for service in the United States army, should upon its return constitute and be reinstated as such First Regiment, and each member be credited with the time spent by him in the Federal service, amounted to a leave of absence, without discharge, and upon their return the regiment was reinstated by operation of law.

The Governor having treated the enlistment of members of the First Regiment, Vermont National Guard, as an enlistment by the Regiment itself, under the act of Congress providing for enlistment by State organizations, no cogent reason appears why that construction should be held erroneous.

The contemporaneous construction of a statute by the executive officer whose duty it is to execute it, is not to be disregarded nor overturned unless clearly erroneous.

A statute is to be construed with reference to its manifest object, and so as to carry out rather than defeat it, if both constructions are possible.

ST. ALBANS, March 20, 1899.

To the Judges of the Supreme Court of Vermont:

Will you consider the chapter in the Vermont Statutes relating to the Militia, together with Act No. 5 of the special session of 1898, and advise me what the duty of the Executive is with reference to reorganizing the National Guard of Vermont?

It is claimed on the one hand that the National Guard no longer exists, and that in view of certain objections on the part of the public, and of the possible unconstitutionality of the Act No. 5 of the extra session of 1898, that the Executive has no authority to move in the premises, and that the organization of the National Guard of Vermont is dead.

It is claimed on the other hand that it is not; that the Act passed at the extra session is constitutional, unequivocal, and has behind it the pledge of the good faith of the State to those men who surrendered their positions in the National Guard, and accepted service as volunteers in the army of the United States; that the State should restore to them the rights and positions they surrendered, and that in any event, irrespective of this, § 4372 of the Vermont Statutes is mandatory on the Executive and that it is his duty to reorganize the Militia at once. Your early attention to this communication is respectfully asked in order that the Executive may be advised how to proceed in dealing with the above question.

Very truly yours,

E. C. SMITH, *Governor.*

To Edward C. Smith, Governor of the State of Vermont:

SIR:—In reply to your request of March 20, 1899, for the opinion of the Judges of the Supreme Court relative to the present status of the Militia of the State, and the reorganization of the same, to which this is attached, the following opinion is given:

On the 30th day of April, 1898, a joint resolution of Congress was approved, entitled, "Joint Resolution for the recognition of the independence of the people of Cuba, demanding that the government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect," and, on the 22d day of the same month, an Act of Congress was approved, entitled, "An Act to provide for temporarily increasing the military establishment of the United States in time of war and for other purposes," and, on the following day, a proclamation was issued by the President, calling for volunteers to the aggregate number of 125,000 in order to carry into effect the purpose of the above-named resolution, the same to be apportioned, as far as practicable, among the several states and territories and the District of Columbia, according to population, and to serve for two years, unless sooner discharged.

By § 6 of said act, it is provided, among other things, "That when the members of any company, troop, battery, battalion or regiment of the organized militia of any state shall enlist in the volunteer army in a body, as such company, troop, battery, battalion or regiment, the regimental, company, troop, battery and battalion officers in service with the militia organizations thus enlisting may be appointed by the Governors of the states and territories, and shall, when so appointed, be officers of corresponding grades in the same organization when it shall have been

received into the service of the United States as a part of the volunteer army."

On May 2, 1898, by General Orders No. 6, issued by the Governor and Commander-in-chief, the First Regiment of Infantry, Vermont National Guard, preparatory to muster into the service of the United States to fill the quota apportioned to the State of Vermont, was ordered to concentrate on the State grounds near Burlington, during the then present week. Previous to the issuing of these orders, and under General Orders No. 5, each company of the regiment was not only recruited to its maximum peace strength of fifty-one officers and men, but, in addition thereto, volunteers to the number of fifty for each company were conditionally enrolled, their acceptance through complete enlistment being contingent upon the probable future requirement that the strength of the regiment be augmented. In this way the regiment was contingently put upon a war basis in strength, and such it was when concentrated under General Orders No. 6, but whether, in fact, these enrolled volunteers became members of the regiment through complete enlistment, does not appear.

By No. 5, Acts of Extra Session, approved May 6, 1898, it is provided that "The First Regiment National Guard of Vermont, though giving up its name and position for the time by volunteering for service in the United States Army, shall upon its return from said service constitute, and be re-instated as, the First Regiment National Guard of Vermont. Each member thereof shall be credited with all the time spent in the service of the United States, in the issuance of the medal given for honorable service, and when such medal issues it shall be especially designated thereon that the soldier served in the war with Spain."

The regiment of infantry to fill the quota of this State under the President's proclamation, was organized according to instructions from the Secretary of War and in conformity to the Acts of Congress approved April 22, and 26, 1898,

and designated, First Regiment of Infantry, Vermont Volunteers, under General Orders No. 7, issued by the Governor and Commander-in-chief, and, as such, was mustered into the United States service on May 16, 1898, on which day he issued General Orders No. 9, which read, "The First Regiment of Infantry, Vermont National Guard, having been mustered into the United States service May 16, 1898, as the First Regiment of Infantry, Vermont Volunteers, the temporary withdrawal of the regiment from the National Guard organization of the State is announced. The Commander-in-chief decides that men recently belonging to the regiment, who have not entered the service of the United States with its volunteers, are entitled to honorable discharge from the National Guard service," and, subsequently thereto, by General Orders No. 10, all such men who did not thus enter the service of the United States, were discharged as of that date.

While the National Guard, as such, was not called into the United States service, it is apparent by § 6 of the Act of Congress, referred to, that it was the intention of the law-making power, to give such organizations an opportunity to enter and become a part of the volunteer army, by enlisting as a body, and it is equally apparent that the State legislature was cognizant of the provisions of this Act of Congress when it enacted No. 5 of the Acts of the Extra Session whereby it is assumed that the First Regiment National Guard will give up its name and position, for the time, by volunteering for service in the United States army, and provides for its re-instatement to its former name and position as the First Regiment, National Guard of Vermont, on its return from such service.

This, in effect, was the granting of a leave of absence to the regiment, and to each member thereof who should enter the United States service, during the term of such service, with a permit to enter the same without expressly or impliedly being discharged from the State organization,

and this is the more apparent from the fact that in the same Act there is a provision that, in the issuance of the medals for honorable service in the National Guard, each member shall be credited with the time spent in the service of the United States.

When the President issued his proclamation of April 23d, it was the duty of the Executive of the State so to administer the law that there should be a full compliance with the requisition thus made upon the State, and, in so doing, he was continually called upon to exercise judgment and discretion. His duties were to be governed by the laws of the United States and the State, and he must exercise his judgment in their interpretation. When the interests of the State demand it, the Governor may require the opinion of the judges of the supreme court, or a majority of them, upon questions of law, connected with the discharge of his duties—V. S. 1006—which is consistent only with the idea that in the performance of his duties, laws must be construed, judgment and discretion exercised.

As the Executive construed § 6 of the Act of Congress of April 22, 1898, the members of the First Regiment of Infantry, Vermont National Guard, enlisted in the volunteer army in a body, as such regiment, for, by his General Orders No. 9, dated May 16, 1898, he says: "The First Regiment of Infantry, Vermont National Guard, having been mustered into the United States service May 16, 1898, as the First Regiment of Infantry, Vermont Volunteers, the temporary withdrawal of the regiment from the National Guard organization of the State is announced;" and again, in General Orders No. 10, dated July 6, 1898, he inserts, as Article IV., "The First Regiment of Infantry, Vermont National Guard, mustered into the United States service, May 16, 1898, as the First Regiment of Infantry, Vermont Volunteers."

No cogent reason is apparent why the construction given by the Executive should be disregarded or held erroneous.

It is a well established principle of law that the contemporaneous construction of a statute by the executive officers of a government, whose duty it is to execute it, is entitled to great weight, and should not be disregarded nor overturned, except for cogent reasons, and unless it is clear that such construction is erroneous. *Heath* v. *Wallace*, 138 U. S. 573.

This construction is conformable to the clear purpose of the legislature in enacting the re-instatement law, and is consistent therewith. This law is to be construed so as to carry into effect the intention of the legislature, which is to be ascertained from the language of the Act taken as a whole, and from its application to existing circumstances and necessities. *Legg, Jr.*, v. *Britton*, 64 Vt. 652.

Any other construction would render this Act of the legislature of no practical effect. A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other will defeat such manifest object, it should receive the former construction. *Ex parte Cohen*, 104 Cal. 524: 43 Am. St. Rep. 127.

It follows, therefore, that when the regiment returned from the United States service, exclusive of the members who were not national guardsmen when they entered that service, it constituted, and was re-instated, as the First Regiment National Guard of Vermont, and the question of reorganization does not arise.

RUSSELL S. TAFT,
JOHN W. ROWELL,
JAMES M. TYLER,
LOVELAND MUNSON,
HENRY R. START,
LAFORREST H. THOMPSON,
JOHN H. WATSON.

APPENDIX.

Re William H. Carney.

Chittenden County Court, March term, 1900.

Passing Oneself off as an Attorney.

Proceedings for Contempt.

Opinion by *Taft*, C. J.

One William H. Carney is brought before the court charged with contempt. The complaint alleges with sufficient allegation of time and place that he "did institute proceedings in said county court without being an attorney of said court, and did wrongfully pretend to the office of an attorney of said court." Process has issued against him to appear and show cause why he should not be dealt with as for a contempt on account of his said doings and pretendings. He has appeared and the matter has been fully heard. It appears that in October, 1897, Carney registered himself as a law student in the office of John Young at Newport in this State, but never studied law in his office. He testifies that after he came to Burlington he studied under the direction of Mr. Ballard, a member of this bar, that he omitted reading some parts of Kent's Commentaries under his direction, notably the subject of "Admirality," but the evidence fails to satisfy us that he ever studied in the office of Mr. Ballard, as required by the rule of the supreme court relating to the admission of attorneys, and we find he did not, so that he is not even a law student in such a sense that he would be entitled to admission as an attorney of the courts of this

State provided he was otherwise qualified. From his own testimony, it appears that since he has been residing in this city, he has been studying law under the direction of and with some suggestions from Mr. Ballard, but not in his office; that during the whole time he has had an office of his own or a desk in the office of some parties, not lawyers, and has been engaged in collecting accounts and attending to any legal matters that came up in behalf of the parties in whose office he was studying, and that he has been engaged in practice as an attorney in the justice courts and the city court of the city of Burlington. During some of the time he did stenographic work for a physician, whose office was in the Y. M. C. A. building, and advertised himself by means of letterheads as an attorney, and solicited business as such.

The tenor of the letter, "Exhibit A," a copy of which is hereto annexed, is sufficient upon which to find the fact that he solicited business as an attorney, as no one but an attorney, or a pretended attorney, would write such a letter.

In that letter he writes to a party in Boston that he has been notified they hold shares of the C. L. I. company's stock, which company was a swindle; that if they desired any redress to inform him at once and he would assist them in recovering some of the money, if not the whole amount they had invested; and he uses such language as this, "I have brought suit for some of my clients and attached all the property belonging to E. M. Barlow of this city. Mr. Barlow was the sole owner and organizer of the so-called Calumet Land Improvement Company." And he further states in the letter facts which show that he was in such a position in regard to proof that might induce a third party to employ him, and suggested that Mr. Barlow would transfer his property as soon as his, Carney's, pending claims were adjusted and the attachments raised, and directing them, if they were interested, to wire him at once.

There is no doubt in regard to this letter as evidence tending to show, and proof of the fact, that he held himself out as an attorney, and solicited business as such attorney.

In March last, he was applied to by a party, H. T. Seaver of Barton, who had a claim against the firm of Knott & Closson in this city, and he instituted proceedings in his, Seaver's behalf, against that firm. He brought a county court suit in which a *capias* was issued, and the parties held to bail in the sum of $5,000. A copy of the writ, served upon the defendants, is referred to and hereto annexed. It will be seen from that, that it is endorsed with his name as an attorney, and his name only. The name of R. E. Brown, an attorney of this court, has been subsequently added, and was upon the writ when it was left with the county clerk for entry. There is no doubt of the fact, and indeed, it is not disputed, that he brought this writ, procured the affidavit for the arrest of the defendants, and had it served; that the writ was endorsed with his name as attorney, no other name appearing thereon. After that, the name of Mr. Brown was added and the writ entered in court by him, Carney.

It does not appear from the testimony that Mr. Brown was ever retained by the plaintiff in that suit. Mr. Brown testifies that he was applied to by Mr. Carney, that Carney said "he was in communication with a gentleman over in Barton who had quite a large claim against Knott & Closson, that the man wanted suit brought and it would have to be brought in the county court, and he couldn't do it, as he was not an attorney, and wanted to know if he, Carney, could employ me in the matter, and said that he understood I had several claims of that kind on hand. I told him that was true and I knew of no reason why I couldn't take care of this if they wanted me."

There is nothing in this that indicates that Mr. Seaver employed Brown or proposed to, but that the employment came directly from Mr. Carney.

Mr. Brown testifies that Mr. Seaver never employed him unless Mr. Carney had authority to do so, and that he did not know from Mr. Seaver, except as he judged from letters that had the same signature as the affidavit.

In reference to the same matter, Mr. Carney testifies that he wrote Mr. Seaver "and told him that I should have the State's Attorney, R. E. Brown, look after that matter for me, and I work in conjunction with him." Carney further testifies that "I told him, (Seaver,) that if I had charge of his case, it would be in conjunction with the State's Attorney and another lawyer; they had charge of the cases." Carney does not pretend that he had any authority from Mr. Seaver to employ any attorney. All that he testifies in respect to it is, "Well, I have the power of attorney in the bankrupt matter, that would be one thing to consider, I should think."

There is nothing in the power of attorney in bankruptcy that gave Carney any right to employ an attorney in reference to the claim or in reference to bringing suits; and he says the only thing with reference to it is that he wrote Seaver, "If you want suit to be brought in this matter, why, sign that affidavit and return."

The power of attorney was the ordinary one given in a case of bankruptcy for the purpose of proving a claim; and he testifies the only authority he had for employing Brown was that Mr. Seaver told him to go ahead with the case, in answer to his inquiry in regard to bringing a suit, his reply being, "If you desire suit brought, you can bring it in your own county, but if you desire suit brought here, send that affidavit and I shall work in conjunction with Mr. Brown." The only authority he claims to have had conferred upon him is contained in the letters, copies of which are hereto annexed.

The fact is apparent, and we so find from the evidence, that he had no authority to employ Mr. Brown as an attorney for Mr. Seaver, and that he did not, in fact nor in terms, employ him as the attorney of Mr. Seaver, but that he engaged him for the purpose of assisting him, Carney, in the prosecution of the suit for the reason that Mr. Brown was supposed to know concerning cases like the one in that suit, and for the further reason that he would not be permitted to appear in the county court.

The fact that Carney was a law student (if one) is immaterial.

It was held in one case, *Williams* v. *Jones*, 5 Barn. & Cress. 108, that an agreement of partnership between an attorney and a person not an attorney to share the profits of the partnership business, as attorneys, was illegal, and it was held immaterial, that the person not an attorney was qualifying himself for the position, and was admitted within six months after the agreement was made.

Had Mr. Brown been retained by Mr. Seaver, such fact would not relieve Carney from the effect of his acts.

Had Mr. Brown known that Carney had no authority from Mr. Seaver to retain him, he, no doubt, would have declined such employment, for, if not, he then would have been lending himself for an unprofessional purpose; he then would have been acting not for Mr. Seaver but as an agent or attorney for Carney, one "not duly qualified to act as an attorney." It is against such acts that the statute 22 George III., hereinafter cited, is particularly aimed and the penalty imposed upon the attorney by that statute is disbarment.

It will be noticed that even in our new possessions the Philippine Islands, an attorney is removed or suspended from the practice of his profession by the supreme court or any of its departments or by any court of the first instance for, among other things, "lending his name to be used as attorney and counsellor by any other person who is not an attorney and counsellor."

Before disposing of the matter in question it may be well to refer to some matters not shown in the evidence in this case but which are of common knowledge, owing to the frequency of the practices and the public rumors relating to them.

It has been the practice in this State for persons who are not attorneys to bring suits before justices of the peace and in the municipal or city courts and they often sign their

names as attorneys, and the names of such unqualified persons appear in the periodicals published in the interests of the legal profession. One in the March number of The American Lawyer, a journal circulated extensively in probably every State of the Union, has the notice of a firm of lawyers who had opened an office in Bethel, this State, one of whom I am told is not an attorney. Some of them have opened offices and advertise as attorneys, or at least their names appear in the directories as attorneys.

There are several, at least, we are told, in this city. They sign their names as attorneys, or have done so, and lately one had his writs endorsed "Burlington Collection Office. Attorney." One under the name of The Mercantile Law Company advertises a "Law Department, written legal opinions furnished subscribers on call without extra charge," "Practice in all courts," and his correspondence indicates that he is engaged in the collection of claims.

They are like those referred to by St. Paul in his first epistle to Timothy I: 7, "Desiring to be teachers of the law: understanding neither what they say, nor whereof they affirm."

The regulations with reference to attorneys have been very strict for centuries. I do not have in mind any instance where persons acting as attorneys can do so without taking an oath with very stringent terms.

In this State, it is, that they will do no falsehood, nor consent that any be done in court, and that if they know of any they will give knowledge thereof to the judges that it may be reformed; that they will not wittingly, willingly or knowingly promote, sue or procure to be sued any false or unlawful suit or give aid or consent to the same; that they will delay no man for lucre or malice, but will act in the office of attorney within the court according to their best learning with all good fidelity as well to the court as to their clients.

When an attorney is in court, or when he is acting for his

client, he is doing so under the sanction of an oath; an oath is regarded as so important that in some places, e. g., in Delaware, when a person is otherwise qualified for admission to the bar, the failure to take the oath before he begins practice subjects him to a fine of $200.

Even the aboriginal inhabitants of our country have stringent regulations in that respect. The Chickasaws require a license for a person to practice law; the Cherokees, a license and an oath; the Choctaws, a good character and a license; and Muskogees require a commission and a good moral character.

The first legislature of this State had been in session but four days when they "voted that a committee to prepare a bill to regulate attorneys be appointed;" and they chose a committee composed of military men for that purpose.

In most of the states, there are stringent regulations in respect to the practice of the law by unqualified persons. One is made guilty of contempt by express statute in Arkansas, California, Idaho, Montana, Nevada and Utah. Severe penalties are imposed in many other jurisdictions. In Kentucky, one who attempts to practice law, not having a license, upon indictment, is fined or imprisoned at the discretion of the jury.

In Massachusetts, one who represents himself as an attorney or legally qualified to practice in the courts, by means of a sign, business card, letter-head or otherwise, is punished by fine not exceeding $100 or by imprisonment not exceeding six months, with greater penalties upon subsequent conviction. In Minnesota, one so guilty is convicted of a misdemeanor and fined not less than $50 nor more than $100. In Missouri, one is deemed guilty of a misdemeanor and punished by fine not exceeding $100. In Nevada, in addition to being adjudged guilty of contempt and punished as in other cases of contempt, he is deemed guilty of a misdemeanor and on conviction fined $100 or

imprisonment in the county jail fifty days. In New York, the penalty is in jail one month or a fine not less than $100 nor more than $250, or both fine and imprisonment. In Pennsylvania, a fine not exceeding $500 and imprisonment not exceeding one year, either or both. In South Carolina the penalty is $500 fine for every cause he shall solicit. In Virginia, he shall forfeit $150 for each case, in which he appears as attorney. In West Virginia, $150 for each case.

It should not be inferred that when penalties are annexed for offenses of this character that the party cannot be proceded against for contempt, for in Wisconsin, in the absence of a statute relating to contempt, it is provided that such offender shall forfeit for each offense not less than $50 nor more than $500, in addition to his liability to be punished as for a contempt.

One must infer from this that the court have power to punish for contempt, without the aid of a statute.

An unqualified person in his practice is not under oath. That is a sufficient reason why he should not practice law. While it has been permitted in this jurisdiction for such a person to practice in the inferior courts, there is no warrant nor justification for his so doing; and in such courts, or if the persons practice anywhere, intruding themselves into the profession as lawyers, they are undoubtedly subject to the provisions of the common law in force in this State with reference to acting as an attorney without being qualified.

When an attorney knowingly permits a person not an attorney, to use his name on a justice writ or process of any kind, without being employed by the party or by his authority, he subjects himself to disbarment, for he lends his name to one not an attorney.

The office of an attorney is an important one. He repreresents the interests and stands in the place of his clients. Great matters are entrusted to his care, and it is necessary that sufficient regulations be had with reference to them. That it is more important in that

profession than in others is seen from the fact that regulations have existed with reference to them for centuries, while it is only of late years that regulations have been had with reference to the other professions—medical, theological, dental, pharmaceutical, etc.; and a license is required for auctioneers, insurance agents, pedlars, innkeepers, restaurateurs, and the like.

A license is required and it is penal without license to catch fish in the water of our lakes and ponds. We think it equally penal for an unlicensed attorney to catch "gudgeons on land." No one is permitted to attend dumb animals unless they have a license and some knowledge of the science which they profess; and in the enterprising north-western state of Minnesota, the oratorical, and ever-talking tonsorial artists, called barbers, are required to have a license certifying to their qualifications before they can be permitted to shave the faces of their customers, although none is required in other transactions.

No one should be permitted to act as an attorney in any matter unless he is within the rules prescribed by law.

We have no statute in this State regulating the profession. None has been deemed necessary; and it is undoubtedly from the fact that we have no statute that unlearned persons have been drifting into the work of attorneys.

But what is the common law in this State?

The legislature at its first session in 1779 passed a statute enacting "that common law, as it is generally practiced and understood in the New England States be, and is hereby, established as the common law of this State." No. 1 Acts (February Session) 1779.

At the June session in 1782, it was further enacted "that so much of the common law of England, as is not repugnant to the constitution or to any act of the legislature of this State, be, and is hereby adopted, and shall be, and continue to be, law within this State.

And whereas, the statute law of England is so connected

and interwoven with the common law, that our jurisprudence would be incomplete without it therefore,

Be it further enacted, that such statute laws and parts of laws of the kingdom of England, as were passed before the first day of October, Anno Domini one thousand, seven hundred and sixty, for the alteration and explanation of the common law, and which are not repugnant to the constitution, or some act of the legislature, and are applicable to the circumstances of the State, are hereby adopted and made, and shall be and continue to be, law within this State: And all courts are to take notice thereof and govern themselves accordingly."

The common law as applicable to the subject under consideration is found in the statutes of King George III., in an act passed in the twenty-second year of that Sovereign, chapter XLVI., section XI., and reads as follows.

"And whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into, and act and practice in the office and business of attorneys and solicitors, to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law; be it therefore enacted, that from and after the twenty-ninth day of September, which shall be in the year of our Lord, one thousand, seven hundred and forty-nine, if any sworn attorney or solicitor shall act as agent for any person or persons, not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of upon the account, or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practice in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint

shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereof, upon oath, to the satisfaction of the court, that such sworn attorney or solicitor hath offended therein as aforesaid, then, and in such case every such attorney or solicitor, so offending shall be struck off the roll, and forever after disabled from practicing as an attorney or solicitor and in that case and upon such complaint and proof, made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person, so acting or practicing as aforesaid, to the prison of the said court, for any time not exceeding one year."

Under this act, which by force of our statutes became a part of the common law, the English courts have since invariably acted.

In *Re Jackson & Wood*, 1 Barn. & Cress. 270, Jackson, an attorney, was struck off the roll and Wood committed to prison for a month, the former permitting his name to be made use of upon the account and for the profit of the latter. In 8 Moore, p. 322, an attorney being found by the prothonotary to be in contempt for allowing another person to practice in his name, the person not being an admitted attorney, the court ordered the attorney's name to be struck off the roll and committed the latter to the Fleet prison for three months. This case is also reported in 3 Dow & Ryl. 260; and it there appears that the names of two of the attorneys, there being three in the firm, were struck off for knowingly permitting the unqualified person to practice as an attorney in their names.

Counsel cited V. S. 1003, but that section relates merely to the power of the supreme court to make rules regulating the admission of attorneys. It has no reference whatever to the case of one who is pretending to act as an attorney not qualified for that purpose. The reference also to 3 Amer. & Eng. Ency. of Law, p. 31, does not aid the respondent. In that connection it is held in one case,

Milligan v. *Fertilizer Co.*, 89 Ala. 322, that when a claim is placed in the hands of a commercial agency for collection, the attorney is the agent of the collecting company and not of the owner of the claim.

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We find from the testimony herein referred to that William H. Carney did intrude himself in the office of an attorney, and that he "did institute proceedings in said county court without being an attorney of said court, and did wrongfully pretend to the office of an attorney of said court."

And it is ordered and adjudged that he is guilty of contempt of this court as charged in the complaint, and he is sentenced to pay a fine to the State of Vermont of fifty dollars and stand commitied until sentence is complied with.

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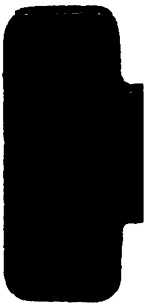

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